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SUPREME COURT, U.S.

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No. 70

Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA, *Appellant*,

v.

PARKE, DAVIS & COMPANY, *Appellee*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

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INDEX

	Page
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	3
Statement	3
Introduction	3
Background Facts Concerning The Sale Of Parke, Davis Products	5
Origin Of The Refusals To Sell	7
The Refusals To Sell	10
Refusals To Sell Directed To Advertising	12
Refusals Discontinued As Ineffective	14
The Decision Of The District Court	14
Summary Of Argument	15
Argument	19
I. The Government Is Not Entitled To The Trial De Novo It Seeks Here	19
II. The Findings Have Not Been Shown To Be Clearly Erroneous And Should Not Be Set Aside	22
A. Rule 52(a) Of The Federal Rules Of Civil Procedure Places A Heavy And Specific Burden On The Government When It Seeks To Challenge The Findings Below	22
B. Each Of The Findings Below Is Amply Supported By The Record	25
1. The Alleged Retailer Conspiracy Regarding Prices	27
2. The Alleged Retailer Conspiracy Regarding Advertising	30
3. The Alleged Wholesaler Conspiracy Regarding Sales To Retailers	36
4. The Alleged Conspiracy Regarding Wholesale Prices	40

Page

III. The District Court Correctly Held That The Action Of Parke, Davis In Refusing To Sell Was Not A Combination Or Conspiracy In Violation Of Sections 1 And 3 Of The Sherman Act 43

A. The Decisions Of This Court Have Rigorously Preserved The Inherent Right Of A Businessman Unilaterally To Select The Customers With Whom He Wishes To Deal 43

B. Wherever A Violation of Section 1 Of The Sherman Act Involving Refusals To Sell Has Been Found, This Determination Has Rested On Additional Conduct Unlike Any Found Here 48

C. The Evidence On Which The Government Relies Is Not Sufficient To Support An Inference Of Conspiracy 53

IV. The District Court Correctly Held, As An Alternative Ground For Dismissing The Complaint, That The Government Was Not Entitled To Injunctive Relief 60

Conclusion 61

Appendix A 1a

CITATIONS

Cases:

Anderson v. Federal Cartridge Corp., 156 F.2d 681 (8th Cir. 1946) 22

Connecticut Importing Co. v. Continental Distilling Corp., 129 F.2d 651 (2d Cir. 1942), *cert. denied*, 317 U.S. 664 50

Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 ..... 43, 44, 45

Ethyl Gasoline Corp. v. United States, 309 U.S. 436 ..... 47, 49, 52

Federal Trade Commission v. Beech-Nut Packing Co., 257 U.S. 441 ..... 44, 50, 59

Federal Trade Commission v. Cement Institute, 333 U.S. 683, *rehearing denied*, 334 U.S. 839 50

Federal Trade Commission v. Motion Picture Advertising Service Co., 344 U.S. 392 ..... 50, 51

Cases—Continued

	Page
Federal Trade Commission v. *Simplicity Pattern Co.*, 360 U.S. 55	47
Flintkote Co. v. *Lysfjord*, 246 F.2d 368 (9th Cir. 1957), cert. denied, 355 U.S. 835	50
Frey & Son, Inc. v. *Cudahy Packing Co.*, 256 U.S. 208	44, 55
Glens Falls Indemnity Co. v. *United States* at the Relation of and to the Use of *Westinghouse Electric Supply Co.*, 229 F.2d 370 (9th Cir. 1955)	21, 22
International Boxing Club of New York, Inc. v. *United States*, 358 U.S. 242	17, 20, 21, 23
Johnson v. *J. H. Yost Lumber Co.*, 117 F.2d 53 (8th Cir. 1941)	54
Klor's Inc. v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207	48
Lorain Journal Co. v. *United States*, 342 U.S. 143	47
McAllister v. *United States*, 348 U.S. 19	25
McElhenney Co., Inc. v. *Western Auto Supply Co.*, 1959 CCH Trade Cases, ¶ 69,416 (4th Cir. No. 7813)	46, 47
Schine Chain Theatres, Inc. v. *United States*, 334 U.S. 110	25
Times-Picayune Publishing Co. v. *United States*, 345 U.S. 594	47
Timken Roller Bearing Co. v. *United States*, 341 U.S. 593	24
United States v. *Bausch & Lomb Optical Co.*, 321 U.S. 707	47, 48, 52
United States v. *Colgate & Co.*, 250 U.S. 300	2, 9, 15, 17, 18, 42, 43, 44, 45, 47, 50, 51, 53, 54, 55, 59, 60, 62
United States v. *W. T. Grant Co.*, 345 U.S. 629	19, 60, 61
United States v. *Hudnut*, 8 F.2d 1016 (S.D.N.Y. 1925)	45
United States v. *McKesson & Robbins, Inc.*, 351 U.S. 305	59
United States v. *National Association of Real Estate Boards*, 339 U.S. 485	24
United States v. *Parke, Davis & Co.*, 1957 CCH Trade Cases, ¶ 68,856 (D.D.C. Cr. No. 444-57)	4, 58
United States v. *A. Schrader's Son, Inc.*, 252 U.S. 85	44
United States v. *Yellow Cab Co.*, 338 U.S. 338	21, 24

Statutes:

Page

Clayton Act, Act of Oct. 15, 1914, 38 Stat. 730, as amended (15 U.S.C. §§ 12 *et seq.*):

Sec. 2 47
Sec. 3 46

Federal Trade Commission Act, Act of Sept. 26, 1914, 38 Stat. 717, as amended (15 U.S.C. §§ 41 *et seq.*):

Sec. 5 ..... 44, 45, 50, 59

Sherman Act, Act of July 2, 1890, 26 Stat. 209, as amended (15 U.S.C. §§ 1 *et seq.*):

Sec. 1 ..... 3, 43, 48, 52, 59
Sec. 3 ..... 3, 43, 59

Virginia Code §§ 59-8.1 to 59-8.9 (1958 Supp.) 7

Rules:

Federal Rules of Civil Procedure:

Rule 41(b) 4
Rule 52(a) 2, 3, 16, 17, 21, 22, 23, 24, 42

Revised Rules of the Supreme Court of the United States:

Rule 10(2) 27
Rule 15 (1) (c) (1) 27
Rule 40(1)(g) 22

Miscellaneous:

Brief for Appellee, *International Boxing Club of New York, Inc.* v. *United States*, 358 U.S. 242 ..... 20, 21
Chafee, *Equitable Servitudes on Chattels*, 41 Harv. L. Rev. 945 (1928) 53

Supreme Court of the United States

OCTOBER TERM, 1959

No. 20

UNITED STATES OF AMERICA, *Appellant*,

v.

PARKE, DAVIS & COMPANY, *Appellee*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

OPINION BELOW

The opinion, findings of fact and conclusions of law of the United States District Court for the District of Columbia (R. 28) dated July 16, 1958 dismissing the Government's Complaint (R. 1) at the conclusion of the Government's proof are reported in 164 F. Supp. 827.

JURISDICTION

The jurisdiction of this Court is as stated in the Government's brief.

QUESTIONS PRESENTED

The parties are agreed that under the rule in *United States* v. *Colgate & Co.*, 250 U.S. 300, which is not challenged here, Parke, Davis & Company can unilaterally select its customers by refusing to sell to those customers with whom it does not wish to deal. Certain refusals to sell to particular customers are challenged by the Complaint. The District Court found that Parke, Davis did no more than refuse to sell, that its conduct was unilateral not conspiratorial and that the *Colgate* rule applied. The central issue in this case is whether the findings of the District Court should be set aside. In determining this issue the following questions are presented:

(1) Should this Court re-examine findings of fact made by the court below where the appellant seeks a trial *de novo* on the entire record and makes no attempt to show that such findings are "clearly erroneous" under Rule 52(a) of the Federal Rules of Civil Procedure?

(2) Are the findings, which are based primarily on the evaluation of contradictory oral testimony, "clearly erroneous" within the meaning of Rule 52(a) of the Federal Rules of Civil Procedure?

(3) Does the record support the District Court's determination that Parke, Davis made no express or implied agreement with any of its customers but merely exercised its right unilaterally to select customers by refusing to sell?

(4) Was there a reasonable basis for the District Court's alternative holding that injunctive relief was neither necessary nor appropriate under the facts of the case?

STATUTES INVOLVED

In addition to the provisions of the Sherman Act, cited in the Government's brief, Rule 52(a) of the Federal Rules of Civil Procedure is pertinent.

Rule 52(a) of the Federal Rules of Civil Procedure reads, in part, as follows:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

STATEMENT

Introduction

This case concerns certain dealings between Parke, Davis and some of its customers in the cities of Washington, D. C. and Richmond, Virginia during a period of a few months in 1956. No other drug manufacturers are involved and no issue of monopoly is presented.

Cut-rate resale prices and advertising policies of certain drugstores in these cities had jeopardized Parke, Davis' good will and business relationship with its many other customers in these areas. Parke, Davis announced a policy of refusing to sell to retailers who cut prices on its products, as well as to wholesalers who sold to such retailers. This effort to protect its business interests was not successful and was abandoned after a short time.

The Government attacked this Parke, Davis sales policy by bringing simultaneous criminal and civil actions in the United States District Court for the District of Columbia, charging a conspiracy to fix prices in violation of Sections 1 and 3 of the Sherman Act.

The criminal case was tried first. At the close of the Government's evidence, the District Court granted a motion for acquittal. *United States* v. *Parke, Davis & Co.*, 1957 CCH Trade Cases, para. 68,856 (D.D.C. Cr. No. 444-57). Thereafter, in June 1958, the companion civil proceeding, which is the subject of the present appeal, came on for trial before a different judge of the same court. The Government voluntarily dismissed the second cause of action, and only the first cause of action was tried. Seventeen witnesses, including three Parke, Davis representatives, were called as witnesses by the Government. At the close of the Government's evidence, the District Court granted a motion by Parke, Davis under Rule 41(b) of the Federal Rules of Civil Procedure to dismiss the complaint on the ground that upon the facts and the law the Government had failed to show any right to relief.

Detailed findings of fact were made covering all phases of the case. The Government now asks this Court to reverse these findings and to accept its version of the facts although two district judges, after hearing the Government's evidence and seeing the witnesses, have refused to do just this.

That Parke, Davis had a right to select customers by refusing to sell is not challenged. The sole issue is accordingly an issue of fact: namely, whether Parke, Davis acted unilaterally as the District Court found it had done, or whether its course of conduct was such that the District Court erred in not finding an implied agreement to fix prices.

As the following summary of the principal facts makes clear, the record amply supports the findings of the District Court that Parke, Davis limited its conduct to unilateral refusals to sell and made no express or

implied agreement with any of its retail or wholesale customers to fix prices.

Background Facts Concerning the Sale of Parke, Davis Products

Parke, Davis is a manufacturer of pharmaceutical products. It competes with hundreds of other manufacturers of these products (Fdg 4, R. 31; R. 140), and competition is intense (Fdg 4, R. 31; R. 273, 275). In the District of Columbia and in Richmond, Virginia, the only areas involved in this case, Parke, Davis sales account for less than 5 per cent of the total sales of pharmaceutical products (Fdg 3, R. 31; R. 271). There has been no claim or proof that the prices of Parke, Davis' 600-odd products are not competitive with the prices of the thousands of other products in the field (Fdg 4, R. 31; Plaintiff's Answer dated January 3, 1958 to Defendant's Interrogatory 6(1)(a)), or that any of the manufacturers with which Parke, Davi competes was in any way involved or affected by the actions challenged here. Indeed, at all pertinent times there was continuous price cutting and advertising of price cuts on products competitive with those of Parke, Davis (Gt. Ex. 2, R. 76, 303-05; R. 223, 245, 275).

Parke, Davis sells its products to retail drugstores both directly and to some extent indirectly through wholesalers; the retailers in turn resell the products to members of the consuming public (Fdgs 5, 1, R. 31-32; Complaint and Answer, para. 8, R. 3, 10). In the Washington area, approximately three-quarters of its sales in 1956 were to retailers, the remainder to wholesalers (Fdg 2, R. 31; R. 182). Retailers' large volume purchases are usually made directly from Parke, Davis, in order to take advantage of quantity

discount prices (R. 59, 79-81, 99, 111-12, 132, 151, 203). The wholesalers, on the other hand, provide such retailers with the convenience of small quantity ("fill-in") purchases, speedy delivery, daily calls, and similar services (Fdg 5, R. 31-32; R. 99, 141, 224, 271).[1]

Parke, Davis unilaterally establishes suggested prices at which its products should be resold by retailers to the public (Fdgs 7-9, R. 32; 6, Ex. 1, R. 57, 301). The suggested retail resale prices are enforced by fair trade agreements in states that have fair trade laws, and are suggested for use in states that do not (Fdg 8, R. 32; 6, Ex. 1, R. 57, 301). The price maintenance policy would not, of course, affect the amount which Parke, Davis received for its goods from wholesalers or retailers (R. 272).

In the spring of 1956, Parke, Davis had a policy of refusing to sell to retailers in non-fair trade areas who did not observe its suggested resale prices, and of refusing to sell to wholesalers who sold to such retailers (Fdg 11, R. 33; R. 169-70, 220, 236, 249-50). This policy was in line with a long-standing Parke, Davis policy of refusing to sell its products to concerns which the Company for one reason or another did not consider desirable customers (R. 236-37).

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[1] The prices at which Parke, Davis sells its products to wholesalers are at such a level as to permit the latter to resell to retailers at the same standard prices as Parke, Davis offers, thus assuring the retailer who does not qualify for quantity prices the same retail markup whether he buys from Parke, Davis or from the wholesalers (R. 235-36, 252; *cf.* R. 41). Before 1947, when Parke, Davis instituted its present distribution setup, Parke, Davis sold its products to wholesalers and retailers at the same prices, with the result that the wholesalers were compelled to charge higher prices on resale than the retailers could obtain by dealing directly with Parke, Davis (R. 235-36).

Parke, Davis had no regularized or systematic machinery for enforcing its policy as to suggested resale prices; it depended wholly upon information that its salesmen might obtain as to price cutting in the course of their ordinary sales activities. It did not, for instance, regularly shop stores or maintain card index files of offenders; and there is no evidence that it sought the cooperation of either retailers or wholesalers in reporting or policing the prices at which its goods were sold (Fdg 10, R. 32-33; R. 239).

Parke, Davis also has for many years unilaterally set resale prices which it has recommended for use by wholesalers (Fdg 7, R. 32; R. 130-31, 139, 162). These prices have long been published to the trade in Parke, Davis' wholesale catalogue, along with a statement that "It is the continuing policy of Parke, Davis & Company in dealing with wholesalers to sell its products to wholesalers who observe" those prices (G. Ex. 13, R. 135, 310A-1013; R. 162, 169-70). The wholesalers customarily follow the recommended resale prices (Fdg 28, R. 38; R. 136, 184, 188, 190, 196).

Origin of the Refusals to Sell

In 1956, neither the District of Columbia nor the State of Virginia had a fair trade law in effect (Fdg 6, R. 32; R. 227).[2] Before the summer of that year, however, Parke, Davis' policy regarding suggested retail prices was not being applied in the District of Columbia or in Richmond, Virginia. Although there was some price cutting in Parke, Davis products (Fdg 12, R. 33; R. 221, 251), this condition was not sufficiently prev-

[2] Virginia has since reinstituted such a law. See Va. Code §§ 59-8.1 to 59-8.9 (1958 Supp.).

alent to cause concern to the Parke, Davis branch manager in Baltimore who was responsible for sales in these cities (Fdg 12, R. 33; R. 222-23). The branch manager, having recently been transferred into the area from a region where fair trade laws were in effect, was in fact not even aware that Parke, Davis had a policy of attempting to obtain observance of its resale prices in non-fair trade areas by refusals to sell (Fdg 12, R. 33; R. 249, 252, 279).

In the spring of 1956, advertising of deep price cuts on some of Parke, Davis' products by one retailer in the District of Columbia, Dart Drug Company, had become a matter of concern (Fdg 12, R. 33; R. 223). The prices Dart Drug was advertising on certain of these Parke, Davis products—principally certain vitamins—were below those at which small retailers could purchase the same products from Parke, Davis (Fdg 16, R. 34; R. 91-92). One of the purposes of such advertising was to attract customers who, though they requested Parke, Davis products, might be induced to buy other brands on which the advertising retailer could make a bigger profit (Fdg 16, R. 94-95, 237-38). The effect of such advertising was to injure the good name and marketability of Parke, Davis' products. The Company's experience made it clear that many of the retailers upon whom Parke, Davis relied for the promotion of its goods, being unable to meet the prices so advertised, would lose interest in the promotion and sale of Parke, Davis' goods and simply turn to products of other manufacturers (Fdg 16, R. 34; R. 237-38, 272-73).

Parke, Davis' branch manager, therefore, sought guidance at a sales meeting at Parke, Davis' headquarters in Detroit, where he was informed of the Com-

pany's policy of refusing to sell to price cutters in non-fair trade areas (Fdg 12, R. 33; R. 250-52). The Company's president stated that this policy was based upon the advice of counsel that the Company had "the right to select our own customers and refuse to sell to those we choose" (R. 252). This advice, based upon the *Colgate* decision[3] (R. 177-78), had been expressed by Parke, Davis' assistant general attorney in the following manner (G. Ex. 16, R. 178-80, 312):[4]

> "The gist of the matter, as briefly as I can state it, is that it is an actionable restraint of trade (except as such agreements are sanctioned by state Fair Trade Laws) to reach an agreement that a customer will observe resale prices. However, it is the right of a trader to adopt and follow a business policy of selling to those customers only who in fact do observe announced resale pricing policies.
>
> "In short, we may enforce an adopted policy arrived at unilaterally by which we announce that we will sell only to those outlets who observe the minimum retail prices set forth in our catalogue or supplements thereto."

Parke, Davis' branch manager thereupon put the Company's policy into effect by instructing his assistants and Parke, Davis' salesmen to inform the trade in the District of Columbia and Virginia that it was Parke, Davis' policy not to sell to retailers who sold its products below the suggested prices, and not to sell

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[3] United States v. Colgate & Co., 250 U.S. 300.

[4] The Government's trial attorney in this case acknowledged to Parke, Davis' assistant general attorney that his interpretation of the Colgate case was correct (R. 176).

to any wholesaler who in turn sold those products to such a retailer (Fdg 12, R. 33; R. 253). The Company's representatives were neither instructed nor authorized to seek agreements on this subject from either retailers or wholesalers, but were merely instructed to state the policy regarding retail prices and its consequences (Fdg 12, R. 33; R. 271-72).[3]

The Refusals to Sell

Pursuant to these instructions, Parke, Davis' salesmen and field managers did, in July 1956, announce the policy to both retailers and wholesalers in the District

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[3] The following testimony, by Parke, Davis' branch manager, who was called as a Government witness, is uncontradicted (R. 271-72):

"Q. When you talked to your salesmen, you were asked about your discussion with Mr. Cummings and Mr. Powers, did you authorize any of them to go out and make agreements with any of your customers about prices?

"A. No, we didn't seek agreements at any time, nor did I ask our men to seek agreements. I told them to state the policy and the consequences.

"Q. The policy was that the wholesalers could not sell to price-cutting retailers?

"A. That's correct.

"Q. Or they would be cut off?

"A. That's correct.

* * * *

"Q. And you would not sell to any retailer who sold below your suggested minimum prices?

"A. That's correct.

"Q. And you authorized no one to enter into an agreement?

"A. I wouldn't have the power to authorize anyone to make such an agreement.

"Q. Did you give them any such authorization?

"A. No."

of Columbia and in Richmond (Fdg 12, R. 33; R. 253-54, 274). Separate, individual calls were made on retailers and wholesalers. There were no joint meetings, joint requests or joint action (Fdg 31, R. 39). The terms in which the policy was stated to the trade were recorded in a memorandum written by the Government's principal witness and the principal price-cutting retailer. This memorandum was written during the actual course of the visit at which he was informed of the policy by Parke, Davis' field manager (G. Ex. 6, R. 98, 308):

> "That any direct account of Parke, Davis whether it be in Md., Virginia or D. C. which does not abide by minimum retail prices as listed in their catalog will be cut off from direct buying. Furthermore any wholesaler who sells a retail store below minimum retail prices as listed in our catalog will be cut off from direct buying. . . ."

Of the 260 or 270 retail drugstores in the District of Columbia (R. 239), only 7 organizations were shown to be involved in any way in this effort by Parke, Davis to enforce its resale price policy.[6] One of these was a cooperative buying and advertising organization of some 30 independent retailers, 22 of whom were in the District of Columbia (R. 146; G. Ex. 22, R. 264, 314B). Upon being informed of Parke, Davis' policy, this group ceased its occasional cooperative advertising of cut prices on Parke, Davis products, although the organization left its member stores entirely free to sell those products, or even advertise them individually.

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[6] Out of the 100 or so retailers in Richmond only one, Standard Drug, was involved (R. 239).

at whatever prices they wished (Fdg 22, R. 36; R. 106, 112-13, 148; Stipulation, R. 26). Upon being informed of Parke, Davis' policy, a representative of one other retailer stated that it would cease cutting prices on Parke, Davis products (Fdg 19, R. 35; R. 226-27, 241), although it is not clear that this retailer did, in fact, stop such cutting (*cf.* R. 255-56).

Despite the announcement of Parke, Davis' policy, however, five other retailers continued to sell Parke, Davis products at cut prices (Fdgs 20, 21, 23, 24, R. 35-37; R. 61-62, 102, 118-19; 151-53, 254). Parke, Davis thereupon ceased to sell its products to those five retailers, and notified five wholesalers serving the District of Columbia and Virginia, making clear to each of the wholesalers separately, that Parke, Davis had a policy of refusing to deal with wholesalers who sold its products to such retailers. (Fdgs 13, 14, R. 33-34; R. 137, 157, 163-64, 205, 223). As a result of the statement of Parke, Davis' policy, three wholesalers which had been making sales of Parke, Davis products in small amounts to the retailers in question attempted, without complete success, to stop such sales (Fdg 14, R. 34; R. 129-30, 138, 141, 151, 164-65, 202-03, 210-11). Despite these refusals to sell, however, the retailers concerned continued to offer Parke, Davis products for sale at cut prices (Fdg 15, R. 34; R. 89-90, 101-02, 110; G. Ex. 2, R. 76, 303-05).

Refusals to Sell Directed to Advertising

At the end of August, 1956, after about six weeks of these unsuccessful attempts to make the policy effective with regard to suggested retail prices, Parke, Davis was forced to recognize that price cutting would continue (*cf.* R. 234, 265). The Company's branch man-

ager informed some of the five retailers in question that Parke, Davis would sell to them regardless of the prices at which they resold Company products in their stores, and would thereafter refuse to supply them only if they advertised cut prices on such products in the newspapers or by window signs (Fdg 17, R. 35; R. 83, 109-10, 119-20, 154, 232-34, 260-61). Thereafter, one of the retailers ceased its newspaper advertising of cut prices on Parke, Davis products (Fdg 23, R. 36-37; R. 74-75) and two others took down window signs mentioning cut prices on Parke, Davis products (R. 110, 120). It does not appear that the other retailers took any action in response to the Company's statement of its position (*cf.* Fdgs 20, 21, R. 35-36). Parke, Davis then resumed selling its products to all five retailers (Fdg 17, R. 35; R. 110, 234-35); and informed the wholesalers that it no longer had any objection to their selling the Company's products to the retailers in question (R. 130, 138, 167, 201, 209, 261).

For a period of a month thereafter, there was no cut-price advertising on Parke, Davis products in the District of Columbia, at least in the newspapers (Fdg 17, R. 35; G. Ex. 10, R. 109, 309; R. 83-84); the retailers, however, continued to sell Parke, Davis products at cut prices (Fdg 17, R. 35; R. 83, 110, 120, 160, 273-74). The advertising of price cuts on Parke, Davis products which was the object of Parke, Davis' concern involved no more than ten or a dozen of Parke, Davis products (R. 89-96; Ex. 4, R. 78, 307; G. Ex. 2, R. 76, 303-05; R. 117-18; *cf.* R. 111). No evidence was introduced to show that the brief discontinuance of this advertising by the few retailers in question had any effect on the prices at which Parke, Davis products were in fact sold to the public (Fdg 25, R. 37).

Refusals Discontinued as Ineffective

Vigorous cut-price advertising on Parke, Davis products broke out again in November, 1956 (R. 75, 82-83), and has continued ever since (Fdg 27, R. 37-38; R. 82-83, 110-11, 122, 169-61). Price cutting continued at all times.

Parke, Davis made no further effort to discourage price cutting or cut-price advertising on its products (Fdg 18, R. 35; R. 75-76, 110-11, 122); in fact, it abandoned any attempt to maintain retail prices in the areas in question, its efforts in this direction through the exercise of its right to choose its customers having proven wholly unsuccessful (Fdg 27, R. 37-38; R. 173-75).

The Decision of the District Court

The District Court, after hearing the witnesses and considering all the evidence presented by the Government, held that the Government had failed to prove the existence of the conspiracy as alleged in the Complaint (R. 30), and granted Parke, Davis' motion to dismiss at the close of the Government's evidence. In its opinion, the court stated that Parke, Davis had "well-established policies concerning the prices at which defendant's products were to be sold by wholesalers and retailers, and the type of retailers to whom the wholesalers could re-sell" (R. 29); that Parke, Davis' representatives "notified retailers concerning the policy under which its goods must be sold, but the retailers were free either to do without such goods or sell them in accordance with defendant's policy" (R. 29); that the representatives "likewise contacted wholesalers, notifying them of its policy and the whole-

salers were likewise free to refuse to comply and thus risk being cut off by the defendant" (R. 29); that "both wholesalers and retailers valued defendant's business so highly that they acceded to its policy" (R. 29); and that "there was no coercion by defendant and no agreement with co-conspirators" (R. 30).

Moreover, the District Court entered detailed specific findings as to each aspect of the alleged conspiracy and each alleged co-conspirator, finding in each instance that the proof failed to support the critical allegations of agreement, understanding and concert of action, but instead showed merely unilateral action by Parke, Davis, and unilateral response thereto by the retailers and wholesalers concerned.

Upon the basis of these findings, the District Court concluded that Parke, Davis' "actions . . . were properly unilateral and sanctioned by law under the doctrine laid down in the case of *U.S. v. Colgate & Company*, 250 U.S. 300." (R. 30).

SUMMARY OF ARGUMENT

The detailed findings of the District Court show that Parke, Davis made a brief and wholly unsuccessful attempt to maintain minimum resale prices in Washington, D. C. and Richmond, Virginia by the unilateral exercise of its right to refuse to sell. The Government acknowledges that Parke, Davis had such a right under *United States v. Colgate & Co.*, 250 U.S. 300. Accordingly, to succeed here, the Government must establish that the findings of fact below are in error, for the findings negate the claim that anything more than unilateral action was involved in Parke, Davis' dealings with its customers.

I

In spite of the clear directions of this Court that antitrust cases should not be brought before it for what amounts to a trial *de novo* on the record below, the Government here seeks just such a trial. No issue is raised as to the applicable law. The Government seeks only to have the Court apply that law to a version of the facts wholly at variance with the specific findings of the court below. It tenders the record as a whole to this Court without specifying any particular finding or findings which are challenged as clearly erroneous. This places an undue and improper burden on the Court, is contrary to the practice of this Court, and inconsistent with the sound administration of justice. There being no controversy as to the applicable law and no specific attack on any finding, the judgment below should be affirmed.

II

Should the Court, nonetheless, embark on a re-examination of the facts, its review is governed by Rule 52(a) of the Federal Rules of Civil Procedure. The findings must be shown to be "clearly erroneous," under that Rule, before they can be set aside. In this instance, the findings were made by the District Court on the basis of a record consisting primarily of oral testimony, frequently contradictory in nature. Testimony of witnesses on direct was substantially altered on cross-examination. Testimony of witnesses conflicted in important particulars, raising issues of credibility. The District Court resolved these conflicts, as it must, and embodied its view of the evidence in specific findings of fact. A review of the evidence

as a whole discloses that there is ample support for each of the findings. The Government's vague and generalized attack on the District Court's assessment of the evidence completely fails to meet the "almost insurmountable burden" which Rule 52(a) imposes in a situation such as this. *International Boxing Club of New York, Inc.* v. *United States*, 358 U.S. 242, 252.

As analysis of the evidence will show, Parke, Davis was well aware of the limits of the *Colgate* doctrine and strictly adhered to it. None of its representatives were authorized to seek agreements and no agreements were solicited. The Company merely announced its policy individually but in equal terms to all retailers and wholesalers concerned. It consistently applied the policy to each retailer and wholesaler separately regardless of how other customers reacted. No steps were taken to implement the policy by policing procedures or eliciting the cooperation of others in the trade. Those who adhered to Parke, Davis' policy did so for their own business reasons and not because of any community of purpose or any assurance as to the conduct of others.

There was specific, affirmative evidence demonstrating, as to each of the alleged co-conspirators, that no agreement of any type was sought or obtained and that Parke, Davis merely announced the policy and carried it out in accordance with its terms. The fact that these efforts to obtain observance of minimum retail prices continued only over a limited period of time, involved only a few customers and were wholly abortive, in itself demonstrates the Company's strict adherence to the limits of that permissible conduct authorized by the *Colgate* case.

III

The effect of the *Colgate* case as applied in Sherman Act cases is clear. To be sure, the agreement or conspiracy proscribed by the Act may be implied from a course of dealing or other circumstances. It cannot be established, however, merely by a policy of refusals to sell, by the seller's announcement of such policy, or by the separate, individual recognition by customers of that policy.

When the courts have found a course of conduct such as to provide the basis for implying collusion, this has always occurred under factual circumstances far different from the facts presented here. This case is devoid of the monopolistic conduct, elaborate enforcement machinery, trade association activity or collaborative efforts invariably present in such cases. In the absence of any real basis for establishing a conspiracy, the Government seeks to upset the District Court's determination by attaching seductive labels to the unilateral acts of Parke, Davis and its customers which are necessarily involved in exercising the rights guaranteed under the *Colgate* decision. The fact that Parke, Davis announced its policy in advance creates no inference of impropriety, for its right to do so is expressly recognized in the *Colgate* case itself. Nor can any impropriety be inferred from the fact that the policy was applied to wholesalers as well as retailers. The wholesalers were also customers of Parke, Davis. The action of each was prompted solely by a desire to remain a customer and did not involve any community of purpose or joint action with each other or with Parke, Davis. The crux of the matter is that Parke, Davis merely stated its policy, applied it to all customers equally, and never made its actions as to one

customer dependent upon what another customer would do.

IV

Finally, the District Court was well within its discretion when it ruled as an alternative ground for dismissing the complaint that the Government was not entitled to injunctive relief even if an agreement to fix prices had been found by the court. Not only did the proof show that price cutting and advertising of cut prices continued in spite of Parke, Davis' efforts, but it was made quite apparent that when the policy proved ineffective it was wholly abandoned. No one familiar with the situation in the District of Columbia can have any doubt but that price cutting on pharmaceutical products, including those of Parke, Davis, has been rampant and widely advertised in that jurisdiction continuously since well before the institution of the present suit. There was a reasonable and adequate basis for this alternative holding of the court under the rule announced in *United States* v. *W. T. Grant Co.*, 345 U. S. 629.

ARGUMENT

I

THE GOVERNMENT IS NOT ENTITLED TO THE TRIAL DE NOVO IT SEEKS HERE.

The Government is, once again, asking this Court for a trial *de novo* on the record below in an antitrust proceeding. No issue is raised by the Government's papers as to the applicable law, which was clearly understood by the court below. Rather, the Government seeks to have this Court apply that law to a version of the facts wholly at variance with the specific

findings of the trial court. It tenders the record as a whole to this Court without anywhere in its papers specifying any particular finding or findings which are challenged as clearly erroneous.[7]

The Government is adopting the same practice here which it condemned only last term in a case where the findings of the court below were favorable to it.[8]

[7] The only instance where the Government explicitly challenges any factual determination of the District Court is at page 29 of its brief. There, the "finding" attacked is actually a statement from the trial court's opinion regarding the fact that each visit to a retailer or wholesaler was separate (R 29). No reference is made to the court's more comprehensive finding to the same effect on this point (Fdg 31; R 39).

[8] In International Boxing Club of New York, Inc., v. United States, 358 U.S. 242, the trial court had entered a judgment based on findings that the defendants had conspired to restrain and monopolize trade and commerce in the promotion of championship boxing contests. Upon appeal, the defendant largely ignored the detailed findings of the trial court and relied upon an independent evaluation of the evidence. The appellant's brief was described in the following terms by the Government:

> Although the issues to be considered on this appeal are those found by the district court, except a few clearly erroneous (Rule 52(a), Federal Rules of Civil Procedure), appellants [sic] in their statement and argument, almost wholly ignore the court's findings of fact. They rely instead on fragmentary evidentiary items culled from the three-volume printed record, without discussing the relation of the cited evidence to the court's findings." Brief for Appellee, p. 5.

The Government took the position that such a presentation did not lay a proper foundation for reversal of the court below:

> Appellants, although asking this Court to reverse the findings of the district court that they had conspired to restrain and to monopolize trade and commerce in the promotion of cham-

There is not, however, one rule of law for the Government and a different rule for other litigants. As this Court forcefully asserted in *United States* v. *Yellow Cab Co.*, 338 U. S. 338, 342, there is nothing which permits the Government, "even in an antitrust case, to come to this Court for what virtually amounts to a trial *de novo* on the record . . . ."

The District Court in this case made detailed, specific findings of fact. There are 31 numbered findings, which comprise nine pages of the record. While the Government clearly does not accept these findings, it is impossible to tell from its papers which findings are challenged. And yet a challenge to specific findings is essential if the Government is to obtain review, since there is no controversy as to the applicable law. If a particular finding or series of findings is to be attacked, the findings should be specified, so that the evidence pro and con relating to the challenged findings can be marshalled and the issue presented to this Court for decision on appeal.[9]

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pionship boxing contests, do not show or even attempt to show that the findings of combination and conspiracy lack evidentiary support and are 'clearly erroneous.' In effect, appellants are requesting this Court to try the case *de novo* on the record, to reject nearly all of the district court's findings, and to substitute its own contrary findings. In these circumstances, no foundation for reversal is laid. United States v. Yellow Cab Co., 338 U. S. 338, and cases cited *infra*, p. 23." Brief for Appellee, p. 19.

[9] The proper practice in an appellate court, when findings made under Rule 52(a) are challenged, is well stated in a recent opinion of the Court of Appeals for the Ninth Circuit:

> "An appellant's mere challenge of a finding does not cast the onus of justifying it on this court. The party seeking to overthrow findings has the burden of pointing out specifically wherein the findings are *clearly* erroneous." Glens Falls In-

Rule 40(1)(g) of this Court requires that a brief exhibit clearly the points of fact and of law being presented. If the Government wishes to retry issues of fact before this Court, the least it should do is to point specifically to the findings of the court below which it considers erroneous and to recognize the burden placed upon it by Rule 52.

Here, while purporting to accept the findings below, and to present only so-called undisputed facts, the Government has in truth ignored many findings and much of the evidence. Its clever but incomplete selection of tidbits from the evidence distorts the effect of the record as a whole. This places a burden on the Court to appraise the entire record, and in effect retry the case without knowing in what particular or particulars the Government contends that the District Court was in error. The tender of the entire record for a trial *de novo* here is so clearly contrary to proper practice in this Court that the judgment below should be affirmed on this ground alone.

II

THE FINDINGS HAVE NOT BEEN SHOWN TO BE CLEARLY ERRONEOUS AND SHOULD NOT BE SET ASIDE.

A. THE Scope OF THE FEDERAL RULES OF CIVIL PROCEDURE PLACES A HEAVY AND SPECIFIC BURDEN ON THE GOVERNMENT WHEN IT SEEKS TO CHALLENGE THE FINDINGS BELOW.

The Government in its brief presents an interpretation of the facts which it has twice unsuccessfully urged upon district judges, first in the criminal case, and

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dennity Co. v. United States at the Relation of and to the Use of Westinghouse Electric Supply Co., 229 F.2d 370, 373 (9th Cir. 1955). See also Anderson v. Federal Cartridge Corp., 156 F.2d 681, 685 (8th Cir. 1946).

more specifically on the trial of this case below. Its request for findings to support this interpretation of the evidence was vigorously and repeatedly urged below but rejected by the District Court.[10] It nonetheless comes forward, without specification of any particular findings which it considers erroneous, and seeks to re-argue the entire case to this Court. It has a heavy and specific burden when it seeks to do this.

Rule 52(a) of the Federal Rules of Civil Procedure provides, in part:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

This Rule has long been recognized as applicable in this Court, and frequently applied in antitrust cases. Last term, in *International Boxing Club of New York, Inc.* v. *United States*, 358 U.S. 242, 252, the Court noted that the appellant had undertaken an "almost insurmountable burden" when it challenged the assessment of the evidence as a whole, since it was required to "show that the findings, or at least the basic ones, are clearly erroneous." The shoe should be on no different foot when the Government is the appellant.

The applicability of Rule 52 to cases such as this was

[10] See Plaintiff's request for findings of fact, filed June 26, 1958; Government's objections to defendant's proposed findings of fact, filed June 27, 1958; Motion by plaintiff for amendment of findings of fact and conclusions of law, filed July 18, 1958, denied July 22, 1958. These papers are included in the record filed in this Court, but are not printed. The stipulation as to printing provides that reference may be made to the unprinted record.

made clear in *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 341-42:

> "It ought to be unnecessary to say that Rule 52 applies to appeals by the Government as well as to those by other litigants. There is no exception which permits it, even in an antitrust case, to come to this Court for what virtually amounts to a trial *de novo* on the record of such findings as intent, motive and design. While, of course, it would be our duty to correct clear error, even in findings of fact, the Government has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion either way but where the trial court has decided it to weigh more heavily for the defendants. Such a choice between two permissible views of the weight of evidence is not 'clearly erroneous.'"

See also *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 596-97; *United States* v. *National Association of Real Estate Boards*, 339 U.S. 485, 495-96:

> "It is not enough that we might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent. See *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 342; *United States* v. *Gypsum Co.*, 333 U.S. 364, 394-95. We are not given those choices, because our mandate is not to set aside findings of fact 'unless clearly erroneous.'"

Rule 52 is particularly significant in this case because the Government relied almost entirely on oral

testimony to establish the alleged conspiracy. Only the trial court had the opportunity to judge the credibility of the witnesses, and credibility was an important issue because the evidence was contradictory on several crucial aspects of the case. The Government's chief witness, for instance, had an interest in the outcome of the litigation in view of a contemplated treble damage suit.[11] His testimony was contradicted by other witnesses and was inconsistent not only with his own testimony in this case and the companion criminal case, but also with a contemporary written memorandum which he had prepared.[12]

Moreover, another experienced trial judge heard and evaluated substantially the same evidence in the companion criminal suit. He reached the same conclusion as did the trial court here: that Parke, Davis had exercised only its right to act unilaterally in selecting its customers and that there was no agreement or conspiracy to fix prices.

As the next section of the brief will show, the findings of the court below are supported by "substantial evidence," see *Schine Chain Theatres, Inc.* v. *United States*, 334 U.S. 110, 117; *McAllister* v. *United States*, 348 U.S. 19, 23, and have not been shown to be "clearly erroneous." They must, therefore, be upheld.

B. EACH OF THE FINDINGS BELOW IS AMPLY SUPPORTED BY THE RECORD

If this Court undertakes a re-examination of the evidence as a whole, as the Government would have it do but is apparently hesitant to ask directly, the Court will find sustantial evidence supporting each of the

[11] See note 24 *infra*.

[12] See notes 15, 21-23 *infra*.

District Court's specific findings.[13] Since the Government has not indicated which findings, if any, it claims to be erroneous, we must necessarily consider the evidence as a whole.

While the nature of the offense charged is now discussed by the Government only in broad and general terms, it was explicitly and concretely defined by the Complaint and the Government's answers to interrogatories. Specifically, Parke, Davis was charged with entering into a "combination and conspiracy" with five named retailers and five named wholesalers as co-conspirators (Complaint, paras. 5, 6, 13; R. 2, 4; Plaintiff's Answers to Interrogatories 1, 2, R. 19, 20). This combination and conspiracy was alleged to consist of a "continuing agreement, understanding and concert of action" with several specific terms: an agreement with the five named retailers obligating the retailers not to cut prices on Parke, Davis products; an agreement with the same five retailers obligating them not to advertise cut prices on Parke, Davis products; an agreement between Parke, Davis and the five named wholesalers obligating the wholesalers not to sell Parke, Davis products to the price-cutting retailers; and an agreement with the same wholesalers regarding the prices at which the latter might resell Parke, Davis products (Complaint, para. 14, R. 4, 5; Plaintiff's Answers to Interrogatories 4(a), 4(c), R. 20, 21).[14]

[13] The Court's attention is directed to Appendix A to this brief, where record references have been assembled against each of the numbered findings to demonstrate that they are well supported.

[14] The Government's claim regarding the alleged conspiracy to fix the wholesalers' resale prices was not included in the statement of questions presented in either the Notice of Appeal or the Juris-

The critical findings are those concerned with the specific actions of Parke, Davis and the named retailers and wholesalers which the Government claims to have been conspiratorial, and which Parke, Davis contends, and the District Court found, to be merely unilateral. These actions must be considered in relation to each of the four aspects of the alleged conspiracy.

1. The Alleged Retailer Conspiracy Regarding Prices

The five retailers alleged to have agreed with Parke, Davis not to sell its products at cut prices were Dart Drug, Standard Drug, Drug Mart, Babbitt and Peoples (Plaintiff's Answer to Interrogatory 2, R. 20). Parke, Davis' representatives admittedly informed each of these retailers of its policy of refusing to sell to retailers who did not observe its recommended prices. The Parke, Davis representatives were not authorized to seek an agreement or undertaking from any of the retailers, but merely to state the policy (Fdg 12, R. 33; R. 271-72); and this is what they did with each retailer separately.[15]

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dictional Statement, although it was adverted to in a footnote in the Jurisdictional Statement (p. 17, n. 16). Under Rule 15 (1)(c)(1) and Rule 10(2) of the Revised Rules of this Court, that aspect of the case does not appear to be properly before the Court. Part of the claim, moreover, was the subject of a second cause of action which was dismissed with prejudice prior to trial of this case (Complaint, para. 17-22, R. 6-7; R. 27).

[15] While one witness, the proprietor of Dart Drug, indicated that he was requested to enter into an agreement with Parke, Davis (K. 61), the best evidence of the manner in which this policy announcement was made was produced by this same witness in a

The evidence shows that Dart Drug and Standard Drug at no time agreed to stop cutting prices; in fact, they were cut off by Parke, Davis because they continued to cut prices on its products (Fdgs 23, 21, R. 35-37; R. 61-62, 89, 90-91, 151-53).

No witness was called from Babbitt, but the evidence shows that Babbitt was cut off (Fdg 20, R. 35; R. 127, 208, 254), and it therefore indicates that Babbitt also must have continued to cut prices.

As far as Drug Mart is concerned, it is clear that the individual stores belonging to this group were always permitted by Drug Mart to sell at cut prices at all times, and even to advertise those prices individually if they saw fit (R. 148). While there were some discussions with Drug Mart concerning advertising of cut prices by the group, which will be discussed below,[16] these did not have to do with the prices actually charged in the individual stores (R. 148). The testimony in this regard was corroborated (R. 112-13) and is uncontradicted.

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contemporaneous memorandum which quoted the Parke, Davis representative as stating (G. Ex. 6, R. 98, 308):

> "That any direct account of Parke, Davis whether it be in Md., Virginia or D.C. which does not abide by minimum retail prices as listed in their catalog will be cut off from direct buying. Furthermore any wholesaler who sells a retail store below minimum retail prices as listed in our catalog will be cut off from direct buying."

No mention appears in this memorandum of the solicitation of cooperation, agreement, or any sort of commitment whatsoever; there is merely a flat statement of Parke, Davis' unilateral intentions. The policy was announced to the other retailers in substantially the same fashion (R. 101, 117-18, 151-52, 226, 241).

[16] See pp. 33-34, *infra*.

As to none of these four supposed co-conspirators, therefore, is there any evidence whatsoever to support the charge of conspiracy with regard to prices.

One other retailer, Peoples, was alleged to have conspired in this regard, but no witness from that company was called to testify. The only direct testimony regarding Parke, Davis' dealings with Peoples was that of a Parke, Davis representative. This witness testified that he had told a vice president of Peoples that Parke, Davis would not sell to Peoples if Peoples cut prices on Parke, Davis products, and that the vice president replied that Peoples would stop cutting prices (R. 226, 241, 247). He also testified as follows (R. 241):

> "Q. . . . Did you make any agreement with Mr. Downey [the vice president of Peoples]?
>
> "A. Never.
>
> "Q. You simply told him that you would refuse to sell him if he continued to advertise or charge cut prices, right?
>
> "A. Correct."

It is not clear, moreover, that Peoples did, in fact, stop charging cut prices (*cf.* R. 255-56).[17]

Evidence such as this clearly supports the District Court's findings that Parke, Davis merely announced

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[17] Other evidence bearing on Peoples' practices regarding its prices for Parke, Davis products includes the testimony of another witness that he was told by a Parke, Davis salesman that "Peoples was going to stop cutting prices, or had stopped cutting prices" (R. 147); testimony that prior to the visit from the Parke, Davis representative at which the Parke, Davis policy was discussed Peoples was cutting prices in only two of its stores (R. 63-64, 89-90); and testimony indicating that Peoples' price cutting had never been very vigorous (R. 255).

its policy and acted thereon, and neither solicited nor obtained an agreement or understanding from these retailer co-conspirators to adhere to the recommended resale prices (Fdgs 19-22, R. 35-36).

2. THE ALLEGED RETAILER CONSPIRACY REGARDING ADVERTISING

The supposed conspiracy not to advertise Parke, Davis products at cut prices involves the same five retailers (Plaintiff's Answer to Defendant's Interrogatory 2, R. 20). It will be recalled that after Parke, Davis found it was unable to maintain minimum resale prices by cutting off price cutters it announced it would cut off those customers who advertised cut prices.[18] It is clear that for a period of about a month after Parke, Davis announced this policy, there was no advertising of cut prices in the District of Columbia, although the retailers continued to sell Parke, Davis products at cut prices (Fdg 17, R. 35; R. 83, 111, 160, 273-74).[19] The issue here, however, is again whether this brief cessation of advertising came about as the result of a collusive arrangement between Parke, Davis and the retailers or, as the court found, resulted merely from the unilateral declaration of the Parke, Davis policy. An examination of the evidence as to each alleged co-conspirator shows the District Court's view of the evidence is fully supported by the proof.

The Government's principal witness on the so-called advertising conspiracy was Haft, the proprietor of

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[18] See pp. 12-13, *supra*.

[19] There was no evidence of any discontinuance of cut-price advertising in Richmond.

Dart Drug.[20] This witness testified that he made not one but two agreements with Parke, Davis on the subject of advertising (R. 64-65, 72-73)—in fact, he used the words "agree" or "agreement" 14 times in his testimony (R. 61, 64, 65, 67, 73, 74, 83, 84, 87).[21] In spite of his obvious desire to interlard his testimony with these magic words, however, he conceded that both of the "agreements" amounted to no more than this (R. 83):

> "Q. He [the Parke, Davis representative] simply said that . . . . if you did advertise he wouldn't sell to you, and if you didn't he would?
>
> "A. That is right, sir.
>
> "Q. And you said to him that if somebody else advertises I am going to advertise?
>
> "A. That is right, sir."

In this critical respect his testimony was consistent with that of the two Parke, Davis representatives with

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[20] The Government objects to Parke, Davis's characterization of this witness, in its Motion to Affirm, as the "main prop" of the Government's case (Brief for Appellant, p. 28 n. 19). But the witness' leading role in the case cannot easily be overlooked. He had instigated the investigation leading to the filing of the suit (R. 88 240), and had a personal financial interest in its outcome. See note 24 *infra*. He was also the Government's leading witness, and gave the most extensive testimony. Moreover, it may be noted that the Government's brief quotes this witness 16 times, and cites his testimony 43 times in all.

[21] In the companion criminal case, this witness testified that he had suggested to a vice president of Parke, Davis that "maybe there was some area of agreement we could have," and that the vice president had replied "nothing doing." (R. 86). In this case, his testimony was that the same vice president had asked him "if I was ready to agree to their terms." (R. 67).

whom he had discussed the question of advertising and who testified that they had not sought and did not have authority to seek, any agreement or undertaking from this or any other retailers, but had merely stated Parke, Davis' policy to him, and left him to decide his own course of action (R. 224-25, 257-59, 260, 261, 265, 271-72). In other respects, however, this witness' testimony was so often contradicted not only by other evidence[23] but even by his own testimony,[24] and his personal interest in this suit was so clear,[25] that it cannot be said that the trial judge committed error if he did not give full credence to Haft's testimony. Considering the evi-

[23] Haft testified that one of the wholesalers referred to the names of the retailers given him by Parke, Davis as a "blacklist" (R. 70); the wholesaler stated that this was "absolutely untrue" (R. 211). Haft also testified that Parke, Davis' branch manager told him, on his visit at the end of August, that the antitrust investigation was one of the reasons for the visit (R. 73); a Parke, Davis representative present at the meeting stated that "that is false" (R. 211). Moreover, all of this witness' testimony about Parke, Davis' efforts to get him to "agree" to raise his prices is belied by a memorandum prepared by him, apparently on the advice of his attorney, at the time of the visit from the Parke, Davis representative who announced the policy to him (Gov. Ex. 6, R. 98, 308). The memorandum, which the witness acknowledged to be accurate (R. 87), makes no mention whatever of any solicitation or suggestion of an agreement, undertaking or commitment of any kind. See note 15, *supra*.

[24] See the testimony at R. 84, where Haft first claimed to recognize and explained in detail a cut-price advertisement of Standard Drug, and then withdrew his testimony. See also note 21, *supra*.

[25] The evidence indicates that Haft instigated the present suit (R. 88, 240); that he had consulted his lawyer with regard to the possibility of bringing a treble damage action against Parke, Davis on the basis of the subject matter of this suit (R. 92) which, of course, would be facilitated by a Government victory in this suit; and that he was attempting in his dealings with Parke,

dence as a whole, it is clear there was no error in his conclusion that

> "Parke, Davis did not at any time solicit an agreement from, or make an agreement with, Dart Drug as to prices or advertising, but rather informed Dart of its policies and acted upon them" (Fdg 23, R. 36-37).

One other alleged co-conspirator, Drug Mart, also ceased advertising price cuts on Parke, Davis products after being informed of the Parke, Davis policy; although this did not affect the policies of the individual stores as far as advertising or charging whatever price they wished, when selling Parke, Davis products (Fdgs 22, 23, R. 36-37; R. 83, 106, 113, 118), and Drug Mart of course continued to advertise cut prices on other manufacturers' products (G. Ex. 2, R. 76, 303-05; G. Ex. 22, R. 264, 311-13). The evidence regarding the reason for Drug Mart's action shows that a Parke, Davis salesman informed the "coordinator" of Drug Mart that Parke, Davis would not sell to any of the member stores if the organization continued its occasional group advertising of cut prices on Parke, Davis products (R. 147-48); that the coordinator asked the advice of the president of the organization (R. 147-48) and a committee of its members (R. 105-06); and that the committee decided by majority vote to stop the advertising in question in order not to be cut off by Parke, Davis (R. 105-06, 112-13).[25] Upon

Davis to lay a foundation for such a suit (R. 60-61, 62-63, 64, 66, 67, 85-87). It may also be noted that before he appeared as a witness in this case, Parke, Davis had ceased to have any dealings with him (R. 81-82; G. Ex. 5, R. 81, 307).

[25] The evidence also indicates that one reason Drug Mart discontinued the advertising was that Parke, Davis had informed

consideration of such evidence as this, the district judge correctly determined that both Parke, Davis and Drug Mart acted unilaterally, and that

> "Parke, Davis did not solicit any agreement, and Drug Mart did not enter into any agreement, or understanding of any kind with Parke, Davis concerning prices or advertising." (Fdg 22, R. 36).

In addition to Dart Drug and Drug Mart, there were two other retailers, McReynolds Drug and State Drug, which, after the Parke, Davis announcement, temporarily took down their window signs which advertised cut prices (R. 99, 110, 119-20, 233, 260-66).[28] Neither of these, however, was even alleged to be a co-conspirator.

As to the three other retailers who were alleged to have conspired to stop cut-price advertising—Babbitt, Standard Drug and Peoples—there is a gaping lack of proof. The only proof of any response by any of them to the Parke, Davis notification was the testimony of the same principal complaining witness, Dart Drug's proprietor, that he was told all three were

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the buyer for Drug Mart, who had been passing along certain promotion payments to the members of the organization for use as discounts on Parke, Davis products, that this was an improper use of such promotion payments, and the buyer was therefore no longer interested in promoting Parke, Davis products (Fdg 22, R. 36, R. 242).

[28] McReynolds Drug and State Drug were among the five retailers who were cut off by Parke, Davis because of their price cutting (Fdg 24, R. 37, R. 102, 118-19). Although so instructed, they took down window signs mentioning cut prices on Parke, Davis products in response to the Parke, Davis announcement, both stores at all times actually sold such products at cut-prices (R. 111, 120).

"back in line" on advertising (R. 64, 74). There was no witness from Babbitt, however, and no evidence of any conversations between Parke, Davis and that organization on the subject of advertising; nor even any evidence that Babbitt in fact did any advertising, let alone ceased to advertise. There was no witness from Peoples, either, and the only evidence regarding any communication between Parke, Davis and Peoples on the subject of advertising was the testimony of a Parke, Davis representative, as follows (R. 241):

> "Q. You simply told him [the vice president of Peoples] that you would refuse to sell him if he continued to advertise or charge cut prices, right?
>
> "A. Correct."

The evidence also showed that Peoples advertised Parke, Davis products once at cut prices and once at the recommended prices during the period in question (G. Ex. 10, R. 109, 309), and that it was not unusual for Peoples to advertise at recommended prices (R. 265).

Finally, as to Standard, the evidence consists of testimony by a representative of that organization that he made no commitment to stop advertising cut prices (R. 159, 227-28), and evidence that Standard in fact advertised cut prices on Parke, Davis products while others were refraining from doing so (R. 83-84).

As to each of these retailers, the trial judge found that

> "Parke, Davis did not solicit any agreement and Peoples [Babbitt, Standard Drug] did not enter into any agreement or understanding of any kind with Parke, Davis concerning prices or advertising." (Fdgs 19-21, R. 35-36).

Taking this evidence—almost all of it oral testimony as a whole, and given the opportunity of the trial judge to observe the witnesses, there is ample support for his conclusion that the Government failed to prove the allegations of the Complaint, and for his findings as to each of the retailers alleged to be co-conspirators, that there was no conspiracy as to either prices or advertising.

3. The alleged wholesaler conspiracy regarding sales to retailers

With regard to the allegation of a conspiracy between Parke, Davis and the wholesalers not to sell Parke, Davis products to price-cutting retailers, five wholesalers are claimed to have been involved: District Wholesale, Washington Wholesale Drug Exchange, H. B. Gilpin Company, Powers-Taylor, and Murray Wholesale (Complaint, para. 5, R. 2). The evidence shows that Parke, Davis advised these wholesalers of its policy of refusing to sell to wholesalers who sold to price-cutting retailers and brought to their attention the names of some of these retailers (Fdgs 12, 14, R. 33-34; R. 137, 157-58, 163-64, 205). However, examination of the evidence as to each of the wholesalers fails completely to support the claim of conspiracy on this subject.

A representative of Washington Wholesale Drug Exchange was called as a witness, for instance, but he was not even asked by Government counsel whether he had curtailed sales to any retailers, and it was not shown that he in fact did so, or indeed that any of the price-cutting retailers even tried to obtain Parke,

Davis products from him (R. 244-62).[27] No representative of Murray Wholesale was even called to testify, and although there is evidence that this wholesaler was notified of Parke, Davis' policy,[28] there is no evidence that he undertook to, or did, act upon it. Moreover, the evidence shows that another wholesale drug firm in Richmond, which was not named as a co-conspirator, continued to sell Parke, Davis products to at least one of the price-cutting retailers in question (R. 154, 158).

This leaves three wholesalers—one in Richmond and two in the District of Columbia—who did attempt to curtail sales of Parke, Davis products to the retailers; these are Powers-Taylor, H. B. Gilpin Company and District Wholesale. The evidence shows that Powers-Taylor ceased selling Parke, Davis products to the one Richmond retailer for a period of three or four weeks (R. 166); and that District Wholesale and H. B. Gilpin, whose sales of Parke, Davis products to the price-cutting retailers were never very substantial (R. 59, 99, 103, 111-12, 141, 202-03), attempted without complete success to cut off those sales to the Washington retailers during periods of two weeks and eight weeks, respectively (R. 211, 212-13; R. 127, 129-30; R. 93-94). None of the wholesalers' sales of products other than Parke, Davis products to these retailers

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[27] Parke, Davis' branch manager and his assistant assumed, erroneously (*cf.* R. 154, 158); that all the wholesalers contacted ceased selling Parke, Davis products to the five retailers (R. 219, 257).

[28] A witness from Standard Drug testified that he had telephoned the president of that wholesaler, who "informed me that he had been notified by Parke, Davis and Company not to ship any of our stores their products." (R. 158).

were, of course, affected (R. 103-04, 143, 153; *cf.* R. 203-04).

As the Government itself is at pains to emphasize (Brief for Appellant, p. 11 n. 8, pp. 30-31), these wholesalers would not have cut off their sales of Parke, Davis products to the retailers in question had it not been for the statement to them of Parke, Davis' policy (R. 142, 168, 219). The critical question is, then, whether the nature of their response to that policy constituted an agreement or understanding; or whether, on the contrary, it was simply a unilateral effort by each to avoid the loss of Parke, Davis' patronage. On this determinative point there is no evidence that Parke, Davis sought any undertaking, agreement, assurance, or even statement of the wholesalers' intentions. In each instance, the Parke, Davis representative simply stated Parke, Davis' policy and nothing more (R. 124-26, 164, 197-98, 207). As for the nature of the wholesalers' response, the president of Powers-Taylor testified as follows (R. 167):

> "Q. They [Parke, Davis representatives] did not ask you to make any agreement?
>
> "A. No, sir.
>
> "Q. And you did not make any agreement about Standard?
>
> "A. No, sir.
>
> "Q. You understood that, if you sold Standard, you would be cut off?
>
> "A. That is right."

The evidence is the same as to the other two wholesalers. The president of the H. B. Gilpin Company testified that he neither was asked to make any agreement nor did make any agreement with the Parke,

Davis representative who communicated with him (R. 139); the vice president of Gilpin explained that the basis for the company's attempt to stop selling Parke, Davis products to the retailers in question was that if it continued to sell to them, it would itself be cut off by Parke, Davis (R. 130). As to District Wholesale, although the vice president of that company said that he had told the Parke, Davis representative; "I will go along with whatever you suggest" (R. 202; *cf.* R. 197, 203), both he and the president of this company, who actually made the decision to cease selling to the retailers (R. 197-98, 199, 210-11), stated that the basis of that decision was simply the knowledge that unless the company cut off the retailers' purchases of Parke, Davis products it would itself be cut off by Parke, Davis (R. 103-04, 210).[29] The president of District Wholesale testified, moreover, that it was the policy of most manufacturers to sever relations with a wholesaler under such circumstances (R. 210).

Evidence such as this, taken as a whole, not merely supports but indeed compels the conclusion that Parke, Davis unilaterally presented its policy to each wholesaler, and that each acted unilaterally in response thereto. The trial judge was clearly correct in finding that

> "There is no evidence that Parke, Davis solicited any agreement, nor that any of the wholesalers

[29] In several instances, a wholesaler explained to the retailers the reason for its refusal to supply Parke, Davis products (R. 71, 103-04, 153-54, 166, 199, 202, 208, 210). In no case was there any mention of any undertaking or commitment or adherence to a plan; rather, the only explanation given was that the wholesaler feared the loss of its own account with Parke, Davis (R. 71, 103-04, 153-54).

made any agreement with Parke, Davis on this subject." (Fdg 14, R. 34).

On this critical point, as on the others, the Government simply failed to prove the allegations of the Complaint.

4. THE ALLEGED CONSPIRACY REGARDING WHOLESALE PRICES

The Government's contentions regarding the alleged conspiracy to fix wholesale prices comprise two separate claims: one, concerning the resale prices recommended for wholesaler use in the Parke, Davis catalogue; and the other, the discounts offered to its customers by the Washington Wholesale Drug Exchange. Each of these claims has previously been abandoned, and neither appears to be properly before the Court.[40] The impropriety of the Government's attempt to revivify these claims is matched by its futility, for there is no substance to either of them.

On the first of these matters—*i.e.*, the recommendation of resale prices for use by wholesalers—the evidence shows no more than that Parke, Davis' wholesaler catalogue states, and has stated for many years, that it is Parke, Davis' policy to sell its products to wholesalers who observe the net price selling schedule set forth in its wholesale price list (G. Ex. 13, R. 135, 310; R. 130-31, 139, 162, 169, 196, 249); and that the wholesalers customarily observe these prices (R. 136, 184, 188, 190, 196; *cf.* R. 162-63). Aside from the statement in the Parke, Davis catalogue, there is no evidence of any communication whatsoever between Parke, Davis and the wholesalers, or any action taken

[40] See note 14, *supra*.

thereon by the wholesalers. The only evidence as to the reason for the wholesalers' use of the recommended resale prices indicates that they did so in order to avoid being cut off by Parke, Davis (R. 190; *cf.* R. 196). There is nothing to warrant even the faintest inference of agreement, understanding, adherence to a plan, concert of action, combination or conspiracy in this regard. As the trial judge concluded (Fdg 28, R. 38):

> "The evidence shows that the wholesalers were familiar with Parke, Davis' policies as stated in Parke, Davis' wholesaler catalogue and had for many years prior to June 1956 observed Parke, Davis' suggested minimum resale prices because they each recognized that if they did not adhere to these prices Parke, Davis would not sell to them and they desired to continue as customers of Parke, Davis. There is no evidence that any of them made any agreement with Parke, Davis as to prices or that Parke, Davis ever solicited an agreement from any of them as to this matter."

As to the aspect of this claim that concerns discounts, the evidence shows that in early 1956 Washington Wholesale Drug Exchange, a cooperative, profit-sharing drug wholesaler, changed its billing practices as the result of a protest by Parke, Davis (R. 189). It had been showing and deducting an automatic 2% cash discount on the face of its invoices in connection with the sale of Parke, Davis goods, even in instances where prompt cash payment was not in fact made (R. 190-91, 270-71). After Parke, Davis' protest, Washington Wholesale ceased to show the 2% discount on the invoice, although the discounts continued in fact to be granted in a different form (R. 191, 209), so that the

change had no effect on the prices actually charged. As to the reasons Washington Wholesale made this change, the evidence shows nothing of conspiracy or the solicitation or offering of agreement, but simply a unilateral statement by Parke, Davis and a unilateral decision made by Washington Wholesale for fear of the loss of Parke, Davis' patronage (R. 190, 271). This is what the trial court found (Fdg 29, R. 38-39).

On neither aspect of the alleged conspiracy regarding wholesale prices, therefore, has the Government offered anything to warrant any consideration of the point by this Court, let alone an overturning of the findings of the District Court.

This analysis of the proof in the light of the allegations of the Complaint as particularized by the Government's answers to interrogatories demonstrates that the findings of the District Court are supported by substantial evidence and are not "clearly erroneous." Indeed, in each particular the proof adduced fails far short of showing the existence of any implied agreement. And the proof, taken as a whole, demonstrates a scrupulous regard by Parke, Davis for the limitations of the *Colgate* rule. It merely announced a policy setting forth the grounds on which it would refuse to sell, and carried out that policy.

The Government has failed to meet its burden under Rule 52(a). Therefore, the findings stand, and it remains only to demonstrate that the District Court correctly applied the law to the facts.

III

THE DISTRICT COURT CORRECTLY HELD THAT THE ACTION OF PARKE, DAVIS IN REFUSING TO SELL WAS NOT A COMBINATION OR CONSPIRACY IN VIOLATION OF SECTION 1 AND 3 OF THE SHERMAN ACT.

A. THE DECISIONS OF THIS COURT HAVE HERETOFORE PRESERVED THE INHERENT RIGHT OF A BUSINESS MAN VOLUNTARILY TO SELECT THE CUSTOMERS WITH WHOM HE WISHES TO DEAL.

As the facts recited above make clear, this case concerns an effort by Parke, Davis to promote and protect the sale of its own goods under intensely competitive circumstances. In an effort to prevent demoralization of its own trade it exercised its right to select customers as recognized in *United States* v. *Colgate & Co.*, 250 U.S. 300. In that case this Court held that in the absence of monopoly the exercise of the traditional right to refuse to sell to unacceptable customers in order to maintain minimum prices does not violate the Sherman Act:

> "The purpose of the Sherman Act is . . . to preserve the right of freedom to trade. In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell." 250 U.S. at 307.

There was, at first, some confusion in the lower courts as to the effect of the *Colgate* case upon the earlier decision of this Court in *Dr. Miles Medical Co.* v. *John D.*

Park & Sons Co., 220 U.S. 373, in which agreements to maintain resale prices had been found to violate the Sherman Act. The relationship of these two cases was, however, soon clarified.

In *United States* v. *A. Schrader's Son, Inc.*, 252 U.S. 85, this Court reversed the decision of a lower court which had interpreted *Colgate* as overruling *Dr. Miles* and set forth the basic distinction between the two cases:

> "It seems unnecessary to dwell upon the obvious difference between the situation presented when a manufacturer merely indicates his wishes concerning prices and declines further dealings with all who fail to observe them, and one where he enters into agreements—whether express or implied from a course of dealing or other circumstances—with all customers throughout the different States which undertake to bind them to observe fixed resale prices." 252 U.S. at 99.

Shortly thereafter, in *Frey & Son, Inc.* v. *Cudahy Packing Co.*, 256 U.S. 208, it was again made clear that the essential agreement, combination or conspiracy required by the Sherman Act might be implied from a course of dealing or other circumstances. In ruling upon a charge of the trial judge, however, the Court held that an agreement or combination forbidden by the Sherman Act could not be established by showing merely that the seller announced a suggested resale price to wholesalers and jobbers, that he called it to their attention on many occasions and that the great majority of them sold at the prices named.

In *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U.S. 441, the *Colgate* principle was reaffirmed and found to apply in proceedings under Section 5 of

the Federal Trade Commission Act relating to unfair methods of competition. That case, and the many lower court Section 5 cases involving resale price maintenance which followed, held that a refusal to sell cannot, in itself, constitute unfair competition and may not be enjoined unless it is part of an otherwise illegal price maintenance scheme.

The effect of the *Colgate* case as defined by these decisions is clear. A manufacturer has the right, under the Sherman Act, to refuse to sell to any customer so long as there is present no element of monopoly, nor any agreement, express or implied, to fix prices. The agreement condemned by the Act may be implied from a course of conduct. It cannot be established, however, merely by a policy of refusals to sell, by the seller's announcement of such policy and by the customers' recognition of the policy. Once the distinction between *Colgate* and *Dr. Miles* had been clarified, there was no occasion for this Court to review cases of the *Colgate* type. The lower courts recognized the distinction between the two decisions and upheld the right of a manufacturer to refuse to sell to price-cutting retailers in the absence of any monopoly or agreement to fix prices.

In an early District Court case, Judge A. N. Hand gave the following statement of the *Colgate* principle:[1]

> "It is true that the distinction between an agreement by word or conduct to maintain a reselling price . . . and a warning that, if such a price is not maintained, future sales will be withheld, is

[1] United States v. Hudnut, 8 F.2d 1010 (S.D.N.Y. 1925). This appears to be the only reported case, after *Colgate*, in which the Government attempted to establish a Sherman Act violation primarily on the basis of refusals to sell.

delicate, and that the second may be accompanied by such circumstances as to show conclusively that a contract is really made. Yet there is a difference, and, if it is not observed, the right to refuse to sell to a customer, who does not by his conduct satisfy his vendor, will disappear. . . ."

The most recent statement of the *Colgate* principle, made by Judge Sobeloff in an opinion dealing with Section 3 of the Clayton Act, is equally clear:

"Generally speaking, the right of customer selection is sanctioned by both statute and case law. Absent conspiracy or monopolization, a seller engaged in a private business may normally refuse to deal with a buyer for any reason or with no reason whatever. Thus, the courts have until now not held a seller liable in damages for refusing to deal with one who is unwilling to enter into an unlawful vertical price agreement or an exclusive dealing arrangement. Clothed with this privilege, the seller not only may, but ordinary fairness would require that he should announce in advance the circumstances under which he will do business with others.

"This is not to say however that the course of dealing between seller and buyer may not go beyond mere customer selection and the independent announcement of policy and ripen into an implied or informal agreement or understanding. But whether there is such agreement is always a question of fact to be determined in light of all the circumstances when the case on a properly pleaded complaint is brought to trial . . . ." *McElhenney Co., Inc.* v. *Western Auto Supply Co.*,

1969 CCH Trade Cases, para 69,416 at p. 75,609 (4th Cir. No. 7813)

Whenever this Court has had occasion to consider a price-fixing conspiracy which incidentally involved a refusal to sell, it has been careful to distinguish the *Colgate* case and to reaffirm the right of the seller, acting unilaterally, to select customers. *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707, 721; *Ethyl Gasoline Corp.* v. *United States*, 309 U.S. 436, 457; *Arbor's, Inc.* v. *Broadway Hale Stores, Inc.*, 359 U.S. 207, 212.

In cases involving monopoly situations, the Court has also made clear that it did not intend to restrict the sellers' right of refusal to sell in the absence of monopoly. *Lorain Journal Co.* v. *United States*, 342 U.S. 143, 155.

Recently, in *Times Picayune Publishing Co.* v. *United States*, 345 U.S. 594, the right of a seller to select customers was carefully considered and reaffirmed by this Court on the basis of *Colgate*. The dissent in *Times-Picayune* was based upon a disagreement as to whether the defendant occupied a dominant position in the market, and did not raise any question as to the continuing validity of the *Colgate* principle.[32]

[32] The reply of the *Colgate* case is so well established that this Court has frequently referred to the provision in Section 2 (a) of the Clayton Act protecting the right to select customers as a codification of that rule. Federal Trade Commission v. Simplicity Pattern Co., 360 U.S. 55, 64.

B. WHEREVER VIOLATION OF SECTION 1 OF THE SHERMAN ACT INVOLVING REFUSALS TO SELL HAS BEEN FOUND, SUCH DETERMINATION HAS RESTED ON ADDITIONAL CONDUCT UNLIKE ANY FOUND HERE.

In all Section 1 cases where conduct involving a refusal to sell has been found illegal, the essential conspiracy or agreement has been established by substantial evidence in addition to the refusals to sell. The facts and circumstances of these cases present situations wholly unlike anything found here.[33]

United States v. *Bausch & Lomb Optical Co.*, 321 U.S. 707, which is relied upon by the Government, is a good example. The manufacturer, Bausch & Lomb, had agreed to supply certain lenses to Soft-Lite and had made a written commitment not to supply such lenses to any other company or compete in any way with Soft Lite. Soft-Lite, in turn, distributed these lenses through optical wholesale companies, 60 per cent of the sales going to wholesalers controlled by Bausch & Lomb. Soft Lite permitted the wholesalers to sell only to "licensed", retailers who agreed to sell the lenses at prices prevailing in the locality and at a premium over comparable lenses. The illegality of the retail license arrangement binding dealers was so clear that it was conceded upon appeal.

The complete dissimilarity between *Bausch & Lomb* and the instant case is immediately apparent and was

[33] Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, cited by the Government, involved the sufficiency of a complaint which alleged a conspiracy among ten leading appliance manufacturers, their distributors and a chain department store not to sell appliances to the plaintiff. Such a conspiracy would, the Court held, be illegal; there was, however, no occasion to consider whether there was evidence to establish the critical matter of agreement or conspiracy.

recognized by the trial judge in granting the motion for acquittal of the defendants in the earlier criminal case involving the same facts:

> "I do think, however, that the *Bausch & Lomb* case is readily distinguishable from the present case . . . by the factual situations.
>
> "In the *Bausch & Lomb* case there was a complicated series of licensing agreements, a system of franchises to retail dealers. In addition, the manufacturer, Bausch & Lomb, was the majority stockholder in the intermediate wholesale corporations with whom the defendant Soft-Lite was alleged to be conspiring.
>
> "It does seem to me in the present case that there is a complete lack of evidence indicating any conspiracy. . . ." *United States v. Parke, Davis & Co.*, 1957 CCH Trade Cases, para. 68,856 at pp. 73, 465-66 (D.D.C. Cr. No. 444-57).

In *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436, there was again an extensive licensing system, and the defendant was found to have comprehensive control of the market in the distribution of lead-treated gasoline. In the words of the Court, Ethyl had

> ". . . established the marketing of the patented fuel in vast amounts on a nationwide scale through the 11,000 jobbers and at the same time, by the leverage of its licensing contract resting on the fulcrum of its patents, it has built up a combination capable of use, and actually used, as a means of controlling jobbers' prices and suppressing competition among them." 309 U.S. at 457.

Again, the complete dissimilarity between this case and the instant case is readily apparent.

Trade association activity, as might be expected, has also been relied upon in finding a conspiracy. Thus, in *Connecticut Importing Co. v. Continental Distilling Corp.*, 129 F. 2d 651 (2d Cir. 1942), *cert. denied*, 317 U.S. 664, the court upheld a finding that the manufacturer had participated in a conspiracy with distributors, all of whom were members of a price maintenance trade association.[34] In *Flintkote Co. v. Lysfjord*, 246 F. 2d 368 (9th Cir. 1957), *cert denied*, 355 U.S. 835, the manufacturer was found to have conspired with members of the Acoustical Contractors' Association which had an allocation arrangement by which jobs were assigned to members in rotation and competitive bidding was eliminated. In each of these cases, the Court clearly stated the *Colgate* principle and recognized the need for substantial evidence aside from refusals to sell.

Reference should also be made to *Federal Trade Commission v. Beech-Nut Packing Co.*, 257 U.S. 441. While this decision involves Section 5 of the Trade Commission Act,[35] which is not in issue here, it serves

[34] The opinion also noted that Continental had participated in joint meetings with the distributors, that each distributor had promised in writing to adhere to the price schedules of Continental and that various means were used to penalize non-complying retailers.

[35] In Federal Trade Commission v. Cement Institute, 333 U.S. 683, 708, rehearing denied 334 U.S. 839, it was held that "individual conduct, or concerted conduct, which falls short of being a Sherman Act violation may, as a matter of law, constitute an 'unfair method of competition' prohibited by the Trade Commission Act." The interpretation of Section 5 was reaffirmed in Federal Trade Com-

to illustrate the type of conduct which the courts have found to be outside the permissible area of *Colgate*. Beech-Nut had adopted and maintained a nationwide scheme for distribution involving "the greater portion of the jobbers, wholesalers and retailers, respectively, in the grocery trades, and a large proporton of the jobbers, wholesalers and retailers in the drug, candy and tobacco trades, respectively, throughout the United States." 257 U.S. at 447. The Court emphasized that the essential element of illegality in this system lay in its reliance upon cooperative arrangements between Beech-Nut and its dealers, whose aid was enlisted in maintaining the price through various types of reporting devices and concerted conduct against offending customers. The cooperation of these dealers in maintaining suggested resale prices was requested and obtained by an extensive enforcement system involving the use of key numbers or symbols stamped on the cases of Beech-Nut products enabling it to ascertain the identity of the distributors from whom such products were purchased; card records containing the names of thousands of jobber, wholesale and retail distributors, and listing the names of those considered undesirable because they were price cutters; and an established practice of reporting the names of dealers who did not observe resale prices and employing salesmen or agents to assist in such reporting.

All of these cases demonstrate that where a conspiracy in violation of Section 1 is claimed, evidence far beyond a mere refusal to sell has been required to

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mission v. Motion Picture Advertising Service Co., 344 U.S. 392, 394 with a citation to the Beech-Nut case. Many of the cases cited by the Government involve Section 5 rather than the Sherman Act and, accordingly, are of doubtful applicability to the case at bar.

establish violation. While each case stands on its own facts, findings of violation emphasize concerted action between the seller and his customers against offending price cutters. This is often achieved through licensing arrangements, trade association activity, strict means of enforcement or the sheer economic power of the seller himself.

Nothing even vaguely similar is found in the present case. No comprehensive licensing system exists here, as in *Bausch & Lomb* and *Ethyl*, *supra*, and there is a complete lack of the market domination which characterized the latter case. No trade association activity is involved, and there were no group meetings or discussions between Parke, Davis' employees and the other parties. Parke, Davis' employees talked with the retailers and wholesalers individually and only when there was a clear and legitimate reason for doing so.

Finally, there was here no comprehensive resale price maintenance scheme with elaborate and effective means of enforcement. This case involves refusals to deal with only five retailers in the District of Columbia. Parke, Davis did not use special agents or solicit information on price cutting. Such complaints as it received were made to regular Parke, Davis employees in the course of calls upon customers (R. 239). Parke, Davis made no attempt, by marks, card indexes or other means, to trace the products received by retailers and did not prepare or circulate lists of price cutters. Indeed, there was no reporting system of any kind.

It is not, of course, necessary that a conspiracy be successful to constitute a violation under Section 1 of the Sherman Act. There must be a conspiracy, however, and the limited scope and ineffectiveness of the Parke, Davis refusals to sell in maintaining resale

prices is therefore significant on the question of its existence in fact. Where conspiratorial agreement has been implied, the effectiveness of the price maintenance activity in cases before this has been very specific and clear.

Here, Parke, Davis was aware of the fact that its right to refuse to sell could be exercised only if the action was unilateral. Its attorneys were well aware of the limitations of *Colgate* and had given good advice. Its employees and representatives, in turn, were instructed not to go beyond such a refusal and they did not do so. The experience of Parke, Davis is a fulfillment of the prediction made by Professor Chafee in 1928, not too long after the clarification of the *Colgate* principles by this Court, that resale prices could not be effectively maintained by a seller exercising his right to refuse to sell. *Equitable Servitudes on Chattels*, 41 Harv. L. Rev. 945, 991 (1928).

The complete lack of any circumstantial evidence of the type normally relied upon to prove a conspiracy adds great weight to the findings, in this case, that no conspiracy existed. It also makes apparent the heavy burden which the Government bears in attempting to establish that these findings of the trial court are clearly erroneous.

C. THE EVIDENCE ON WHICH THE GOVERNMENT RELIES IS NOT SUFFICIENT TO SUPPORT AN INFERENCE OF CONSPIRACY.

As considered in detail above, the evidence fully supports the findings of the trial court that no conspiracy existed. From a careful consideration of the cases, it is also clear that the usual circumstances from which a conspiracy is inferred—license agreements, trade association activity, economic domination or an elaborate enforcement system—are entirely lacking. In

the absence of any real basis for establishing a conspiracy, the Government has attempted to do so by attaching seductive labels to the unilateral acts of Parke, Davis and its customers which are necessarily involved in exercising the rights assured by the *Colgate* decision.

The Court of Appeals for the Eighth Circuit has provided an excellent formulation of the proper approach in Sherman Act cases involving refusals to sell:

> "From the mere fact of refusing to sell to plaintiffs, there can . . . arise no inference of an unlawful agreement, because one may lawfully select his own customers. [Cases cited]. There must be substantial evidence furnishing some basis from which the alleged fact of such an agreement may reasonably be inferred. 'A fraudulent conspiracy may be shown by circumstantial evidence, but the facts and circumstances relied upon must attain the dignity of substantial evidence and not be such as merely to create a suspicion.'" *Johnson* v. *J. H. Yost Lumber Co.*, 117 F.2d 53, 61 (8th Cir. 1941).

Whether an agreement or conspiracy existed depends upon facts and cannot be resolved by name-calling. To refer to a seller's policy of not selling to price-cutters as a "campaign" or to call the announcement of this policy a "threat" does not change the facts. To be sure, Parke, Davis announced its policy generally to all customers in advance, but its right to do so was expressly recognized in *Colgate* and subsequent cases. To be sure, customers who had been cut off wanted to be reinstated and Parke, Davis was thus obliged to reiterate its policy and explain that customers who cut prices would not be sold. But there is nothing to indicate that

these conversations were anything more than reiteration of the policy.

Nor does it change matters to characterize the recognition of this policy by some customers as "forced cooperation." This Court held very explicitely in *Frey & Son, Inc.* v. *Cudahy Packing Co.*, 256 U.S. 208, that adopting a policy of refusals to sell, calling the attention of customers to this policy and the customers' acquiescence in it are not sufficient to establish a violation of the Sherman Act. Indeed, any other view would make the *Colgate* decision meaningless.

Hard put to point to a course of conduct from which agreement can be implied, the Government seeks to attach the label "concerted action" to Parke, Davis' dealings with the retailers on the subject of prices by emphasizing the concern of some of the retailers for what their competitors were doing. But the fact that a businessman is concerned about what his competitors are doing, and governs his behavior in part according to theirs, does not of itself give rise to an inference of conspiracy. Certainly no such inference can be supported here, in the face of repeated and uncontradicted evidence that Parke, Davis announced its policy to each retailer separately (R. 59, 100-01, 117-18, 124-46, 151-52), and applied it to each retailer separately regardless of what others might or might not be doing (R. 63-64, 90, 117-18, 151-53).

Similarly, the facts that no retailer was willing to cease advertising until he thought his competitors were doing the same, and that each was determined to advertise as soon as anyone else did, merely show normal, predictable, competitive behavior to be expected from sensible businessmen, and give rise to no inference of deliberately concerted action. Moreover, any such

inference here is negated by uncontradicted evidence that, as far as Parke, Davis was concerned, its policy was applicable alike to each retailer individually, regardless of whether other retailers abided thereby (R. 260-61).

The situation as to wholesalers is the same: although one wholesaler, concerned about its competitors, twice asked Parke, Davis representatives whether other wholesalers were also being informed of the policy (R. 198, 202, 206, 207), it was clear at all times that Parke, Davis' policy was applicable to each wholesaler separately, whether or not retailers or other wholesalers responded to the policy (R. 253)—as at least one wholesaler, in fact, did not (R. 154, 158).

None of these aspects of the case involves coercion, boycott or concerted action by Parke, Davis with its customers to enforce minimum prices. Parke, Davis always acted unilaterally in its own business interests, attempting to preserve the system of distribution it considered sound. Those retailers and wholesalers who adhered to the Parke, Davis policy—and only some of them did—acted in their own self-interest to avoid being cut off, and not in order to join forces with Parke, Davis in the accomplishment of any common purpose.

The Government also places great emphasis upon statements of some of its witnesses to the effect that they did "go along with PD" or "agreed to abide by PD's policy." On analysis these statements are not controlling or indeed even persuasive.[36] The crux of

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[36] The Government is at pains to ridicule the testimony of a number of witnesses to the effect that they did not enter into any "agreement" with Parke, Davis, contending in effect that it is not the use of the word "agree" that determines whether a conspiracy

the matter is not whether the witness used the word "agreed" or a similar term; rather, it is whether Parke, Davis sought to obtain an agreement with its customers rather than merely to inform them of its policy and the action the Company proposed to take. The evidence is clear that Parke, Davis did not go beyond a statement of its position, which was unilateral and permissible under *Colgate*, when it informed customers that they would be cut off if they failed to maintain minimum prices or if they advertised cut prices. Such statements solicited no agreement and for that matter did not even require a response. Surely a customer creates no legal liability if he responds by saying colloquially "I'll go along" or "I agree to go along."

Since the retailers made no express or implied agreement with Parke, Davis not to sell at cut prices and indeed throughout the entire period most of them continued to cut prices on Parke, Davis products, it is difficult for the Government to sustain its position as to the retailer phase of the conspiracy. The Government seems, therefore, to place its greatest emphasis on the wholesaler aspects of the case. It is urged that wholesalers were pressured, forced to cooperate, coerced and organized into a boycott of the retailers. Repeatedly the wholesaler is pictured as a competitor of Parke, Davis dependent on Parke, Davis for sur-

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is formed, but the nature of the participants' conduct (Brief for Apellant, p. 34, and nn. 23, 24). The Government's contention on this point is belied by its own excessive reliance, both here and in the court below, on the use of the word "agree." See, *e.g.*, R. 61, 65, 101, 224, 225, 229, 264; Brief for Appellant, pp. 9, 10, 11, 12, 13, 14, 25, 30, 35. Parke, Davis agrees fully, however, that the critical question is not the specific words by which the witnesses characterize their conduct or conversations, but the actual nature of the events they are describing.

vival and existing at Parke, Davis' mercy. These various characterizations ignore the evidence and the actual business realities of the situation as disclosed by the record.

Parke, Davis was merely one of many pharmaceutical lines handled by these wholesalers, and no exclusive dealing arrangement or licensing system was involved. The wholesaler's only interest was in continuing to carry Parke, Davis goods so that he could offer a full line to the trade. When Parke, Davis announced it would refuse further dealings if the wholesaler sold to price-cutting retailers, it was obviously in the interest of the wholesaler not to make such sales. He followed this course for the simple reason that he desired to handle Parke, Davis goods and knew that he would be cut off if he did not (R. 103-04, 154, 167, 210). The action did not involve concerted action with Parke, Davis to injure the trade of the retailers.

As the district judge stated in granting Parke, Davis' motion for an acquittal in the companion criminal case,

> "In other words, when representatives of Parke, Davis Company went to the Gilpin people or to the District Wholesale Drug Company, they said in effect, you can dispose of these goods as you see fit but if you sell them to retailers that are not maintaining our prices, we will not sell to you in the future. I think that doesn't constitute an agreement when the wholesaler, looking to his own future business and his future financial interest, decides that he is going to maintain this price." *United States* v. *Parke, Davis & Co.*, 1957 CCH Trade Cases, para. 68,856, (D.D.C. Cr. No. 444-57) at p. 73,466.

Nothing in the cases teaches that the right to unilaterally select customers is confined to retail customers but excludes wholesaler customers. On the contrary, the *Colgate* case itself involved a refusal to sell to wholesalers by a manufacturer which also sold directly to retailers, and wholesalers have frequently been involved where the legitimate exercise of the right of refusal to sell was recognized.[37]

For the Government to refer to Parke, Davis' dealings with the wholesalers as a boycott merely begs the question. A boycott would involve an agreement between the wholesalers and Parke, Davis and there was no such agreement here. Nor does the Government bring this case within the rule of *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, by emphasizing that Parke, Davis and its wholesalers are to some extent competitors. In that case there were admittedly written price agreements between McKesson and its wholesalers, and the status of McKesson as a competing wholesaler was significant only in determining whether these agreements were within a statutory exemption from the Sherman Act. Here, there are no agreements.

A conspiracy or agreement under Sections 1 and 3 of the Sherman Act could have been found in this case

[37] In the Beech-Nut case, for example, the manufacturer had refused to sell to "jobbers, wholesalers and retailers who failed to maintain the resale prices so fixed by it, or who sold to other distributors who failed to maintain such prices; . . ." 257 U.S. at 445. This Court made no distinction between wholesale and retail distributors in directing modification of the enforcement order. As to both, the right of refusal to sell was preserved, and the prohibition was limited to cooperative methods used to carry into effect the price maintenance scheme which had been found to violate Section 5 of the Federal Trade Commission Act.

only if the District Court had been willing to go beyond the rules developed in other cases. This would have been, in substance, to disregard *Colgate*, to brush aside the express statutory requirement that a conspiracy or agreement must be proved, and to decide that the Sherman Act has destroyed the right of a businessman to select his customers. The Government has presented nothing in the circumstances of this case to warrant so drastic a revision of long-standing law.

IV

THE DISTRICT COURT CORRECTLY HELD, AS AN ALTERNATIVE GROUND FOR DISMISSING THE COMPLAINT, THAT THE GOVERNMENT WAS NOT ENTITLED TO INJUNCTIVE RELIEF.

The District Court also held that the awarding of injunctive relief was neither necessary nor appropriate, even had Parke, Davis, contrary to the court's findings, been engaged in unlawful price activities. In order to overturn the District Court's determination on this point, the Government must make a "strong showing of abuse" and demonstrate that there was "no reasonable basis" for his determination. *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 633, 634.

The following guide for determining whether injunctive relief should be granted was set forth in *United States* v. *W. T. Grant Co., supra*:

> ". . . the moving party must satisfy the court that relief is needed. The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive. The chancellor's decision is based on all the circumstances; his discretion is necessarily broad and a

> strong showing of abuse must be made to reverse it. To be considered are the bona fides of the expressed intent to comply, the effectiveness of the discontinuance and, in some cases, the character of the past violations." 345 U.S. at 633.

The Parke, Davis practices on which the Government's case is based occurred only in Washington, D. C. and in Richmond, Virginia during the summer of 1956, and lasted over a period of no longer than four months. The actual refusals to sell involved only five out of 260 retailers in the District of Columbia, and one out of 100 in Richmond. The effort to prevent price cutting and advertising of price cuts was wholly ineffective.

By November, 1956—almost three years ago—Parke, Davis had abandoned its policy of refusing to sell to price-cutting retailers. Since that time, retailers in both the District of Columbia and Richmond, Virginia have continuously sold and advertised Parke, Davis products at cut prices and have been able to obtain these products from wholesalers and or Parke, Davis itself.

The determination of the trial judge that business and economic reasons had compelled abandonment of the policy of refusing to sell to price-cutting retailers seems almost unavoidable.

Under the tests set forth by this Court in the *W. T. Grant* case, there was clearly a reasonable basis for the conclusion of the trial court that injunctive relief was neither necessary nor appropriate.

CONCLUSION

The District Court properly applied the law to the facts. The Government has failed to show any reason why this Court should attempt to retry the case, let

alone set aside detailed findings of fact which are based on substantial evidence and which therefore are not "clearly erroneous."

The record shows that Parke, Davis kept well within the permissible area of conduct delineated in *United States* v. *Colgate*. It unilaterally announced a policy and unilaterally carried it out by means of refusals to sell; it engaged in no conduct from which collusive price-fixing could reasonably be implied. There was no agreement or conspiracy to fix prices in violation of the Sherman Act. The judgment of the court below should be accordingly affirmed.

Respectfully submitted,

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SEPTEMBER 24, 1959.

APPENDIX A

Specific Findings by the Trial Court and Supporting Record References

Set forth below are the trial court's specific findings of fact (R. 31-39), together with references demonstrating that each is well supported by the record:

Findings of Fact

1. The defendant, Parke, Davis & Company (hereinafter referred to as Parke, Davis) is a corporation organized and existing under the laws of the State of Michigan, with its principal place of business at Detroit, Michigan. It transacts business and is found within the District of Columbia. It maintains a branch office at Baltimore, Maryland, to which pharmaceutical products are sent in interstate commerce from its principal plant in Michigan. These products are then distributed in interstate commerce from its Baltimore office to various drug wholesalers and retailers, including drug wholesalers and retailers in the District of Columbia and the State of Virginia (Complaint and Answer, paras. 2; 3, 89; R. 1-3, 9-10). The Baltimore branch office operates in accordance with policies laid down by the Company's home office in Detroit (R. 251, 265).

2. Parke, Davis manufactures approximately 600 different pharmaceutical products, including both prescription and non-prescription items (R. 89). In 1956, the total dollar volume of its sales in the District of Columbia and Richmond, Virginia, was as follows:

	To Retailers	To Wholesalers
District of Columbia	$499,304	$161,247
Richmond, Virginia	58,870	113,651

(R. 182).

3. Parke, Davis' sales constitute less than 5% of the sales of pharmaceutical products in the District of Columbia and Richmond, Virginia (R. 271). There are about 2,000 different drug manufacturers selling about 178,000 different drug items in the District of Columbia (R. 140).

4. Plaintiff makes no claim that the prices for Parke, Davis products are not competitive with similar products

produced by other pharmaceutical manufacturers (Plaintiff's Answer, dated Jan. 3, 1958, to Defendant's Interrogatory 6 (1) (a), R. 17). Parke, Davis' products are sold in the District of Columbia and the State of Virginia in intense competition with the products of other manufacturers (R. 273-75).

5. Retailers may buy Parke, Davis products either directly from Parke, Davis or from wholesalers (R. 59, 195-96). Ordinarily, their large volume purchases are made from Parke, Davis which offers a lower quantity price on some of its products than the wholesalers offer (R. 59, 79-81, 111-12, 132, 140-41, 196, 203, 224, 252). The wholesalers, on the other hand, provide the retailers the convenience of smaller quantity purchases, day-to-day service, and a wide variety of products of many different manufacturers (R. 99, 141, 224, 271).

6. During the period covered by the Complaint, there were no Fair Trade laws in effect in either the District of Columbia or the State of Virginia (R. 101, 160, 227).

7. Suggested minimum resale prices were unilaterally established by Parke, Davis for retailers and wholesalers in the District of Columbia and Virginia and elsewhere, and were published to the trade long before the summer of 1956 (R. 56-58, 130-31, 139, 162, 190, 218; G. Ex. 1, R. 57, 301; G. Ex. 13, R. 135, 310A-10B).

8. The Parke, Davis catalogue for retailers contained the following statement under the heading "Minimum Retail Pricing Applying to Parke, Davis Products"

> "The minimum Retail Prices herein set forth or in the Price Change Supplements applying thereto are in conformity with the provisions of the Fair Trade Laws of the States having such laws and are suggested for use also in those States which have not enacted Fair Trade Laws." (G. Ex. 1, R. 57, 301).

9. The Parke, Davis catalogue for wholesalers contained the following statement under the heading "Wholesale Drug Trade Sales and Distribution Policy"

> "It is the continuing policy of Parke, Davis & Company in dealing with wholesalers to sell its products to wholesalers who observe the Net Price Selling Schedule in this Parke, Davis & Company Wholesale Drug Trade Biller's Price List and Supplements, and who

confine their distribution of Parke, Davis products, whether Rx legend or non-Rx legend, to customers authorized by law to fill or dispense prescriptions." (G. Ex. 13, R. 135, 310A-10B).

10. Parke, Davis did not have any regularized or systematic machinery for maintaining its suggested minimum prices as to either retailers or wholesalers. It did not regularly "shop" stores, maintain card index files, or in any other manner police its suggested minimum prices in either the District of Columbia or Virginia (R. 239), nor is there any evidence that it sought or obtained the cooperation of retailers or wholesalers in reporting or policing deviations from its suggested minimum prices.

Parke, Davis learned of the price cutting through its salesmen who called at those retail stores which ordered directly from Parke, Davis; the salesmen reporting the cut prices and advertising thereof, due to the complaints of such retailers (R. 239).

11. In the spring of 1956, Parke, Davis also had a policy of refusing to sell to retailers it deemed to be undesirable customers, including those whose failure to maintain suggested minimum retail prices disrupted the market, and of refusing to sell to wholesalers who sold to retailers who were considered undesirable (R. 169-70, 220, 236-67, 249-50).

12. For a short time prior to the summer of 1956, there had been minor price cutting by certain retailers in the District of Columbia. Parke, Davis and its wholesalers continued to sell to these retailers until the deep price cutting by retailer Dart Drug Company demoralized the market and caused the Baltimore branch manager to inquire as to a possible remedy at a Branch Managers' meeting at Detroit (R. 222-23, 251-52). This manager, prior to coming to the Baltimore office, had been in a branch which operated only in states having effective Fair Trade laws (R. 279). At that meeting, he learned for the first time that the Company took the position, upon the advice of counsel, that in a non-Fair Trade area it could unilaterally refuse to sell to retailers who refused to observe the recommended resale prices of the Company (R. 250-52). Upon the basis of this information, the manager of the Baltimore branch office stated that he would apply this policy in the District of Columbia (R. 274), and upon his return he instructed his

assistants and the Company's salesmen to inform the trade in the District of Columbia and Virginia that it was the policy of Parke, Davis not to sell to any retailer who sold Parke, Davis products below suggested minimum prices, and not to sell to any wholesaler who, in turn, sold those products to such a retailer (R. 253). Parke, Davis did not seek to enter into agreements with anyone, did not instruct its representatives to seek agreements nor authorize them to do so, but merely gave them authority to state the policy and its consequences (R. 271-72). These instructions were carried out in July, 1956 (G. Ex. 6, R. 98, 308; R. 101, 117-18, 151-52, 226, 241).

13. When five retailers continued, despite the announcement of Parke, Davis' intentions, to sell Parke, Davis products below the suggested minimum retail prices, Parke, Davis discontinued selling to them and told wholesalers in the District of Columbia and Virginia that it would discontinue selling to them also if they sold Parke, Davis products to those retailers (R. 253-54).

14. Parke, Davis brought to the attention of each of the five wholesalers named as co-conspirators in the Complaint the names of several of the retailers who were selling its products at prices below the recommended retail prices (R. 137, 163-64, 205). Three of the wholesalers attempted to stop their sales of Parke, Davis products to those retailers in order not to be cut off themselves (R. 103-04, 130, 138, 164-65, 167, 210), although occasionally such products were sold by inadvertence to those retailers (R. 129-30, 211). There is no evidence that Parke, Davis solicited any agreement, nor that any of the wholesalers made any agreement with Parke, Davis on this subject (R. 124-26, 130, 139, 167, 210).

15. The retailers who were cut off by Parke, Davis because they failed to observe Parke, Davis' suggested minimum retail prices continued nonetheless to advertise such products at cut prices by window displays (R. 101-03, 110, 119) or newspaper advertisements (G. Ex. 2, R. 76, 303-04) for the reason that they still had such products in their inventory.

16. Advertising of price cuts by a few retailers in the District of Columbia was, so far as Parke, Davis products were concerned, confined to a few products, mostly certain popular vitamins (R. 89, 111). In some cases, the prices quoted in the advertisements were below the price at which

a small retailer could purchase the same product from Parke, Davis or one of its wholesalers (R. 91-92). These advertisements injured the good name and marketability of Parke, Davis' products generally and resulted in Parke, Davis losing the support and confidence of the great majority of the retailers upon whom it relied for the promotion of its goods (R. 237-38, 272-73). The principal cut-price advertiser, Dart Drug, encouraged customers responding to its advertisements to purchase its own private brand of vitamins, and the proprietor of that concern acknowledged that on occasion its salesmen had switched customers requesting Parke, Davis products to such Dart private brands (R. 94-95). This was one of the purposes of cut-price advertising (R. 237-38).

17. In the latter part of August 1956, Parke, Davis' representatives separately advised some of the retailers it had cut off, of a change in the policy regarding retail prices, and stated that Parke, Davis would sell its products to them regardless of the prices at which they resold those products, but that Parke, Davis would not sell to them if they advertised price cuts on Parke, Davis' products in the newspapers or on their windows (R. 83-84, 109-10, 119-20, 154, 159, 257-58, 260-61). Parke, Davis then resumed selling its products to each of these retailers (R. 234-35), and although these retailers continued to sell Parke, Davis products at cut prices, for a period of one month, there were no newspaper advertisements in the District of Columbia offering Parke, Davis products at cut prices (R. 84, 112; G. Ex. 10, R. 109, 309). Parke, Davis neither solicited nor obtained any agreement regarding advertising from any of these retailers (R. 258, 260-61).

18. Although advertisements featuring Parke, Davis products at cut prices commenced to appear again in newspapers in the District of Columbia at the end of September 1956 (R. 84, 112), and although the retailers which had ceased such advertising thereafter resumed it (R. 75-76), Parke, Davis took no further action with regard to retail prices or advertising, and it continued to sell to all retailers concerned (R. 75-76, 81, 110-11, 122).

19. No witness was called connected with Peoples. The evidence shows that a representative of Parke, Davis advised a representative of Peoples that Parke, Davis would not sell to that company if it did not observe Parke, Davis' suggested prices. The Peoples' representative stated that

Peoples would stop cutting prices on Parke, Davis' products and Parke, Davis continued to sell to Peoples (R. 226, 241). Parke, Davis did not solicit any agreement, and Peoples did not enter into any agreement or understanding of any kind with Parke, Davis concerning prices or advertising (R. 241).

20. No witness was called connected with Babbitt. There is no evidence that Parke, Davis solicited any agreement, or that Babbit entered into any agreement or understanding of any kind with Parke, Davis concerning prices or advertising. However, sales to Babbitt were curtailed for a period of time and later resumed (R. 127, 208, 254).

21. Standard Drug was advised of Parke, Davis' policy and informed that if it continued to cut prices on Parke, Davis products it would be cut off (R. 151-52, 157). It made no commitment of any kind to Parke, Davis, it continued to cut prices, and it was cut off for about two weeks (R. 151-53). Parke, Davis did not solicit any agreement, and Standard Drug did not enter into any agreement or understanding of any kind with Parke, Davis concerning either prices or advertising.

22. Drug Mart, a group of some 30 independent retail pharmacies in the District of Columbia, engaged in cooperative advertising and purchasing (R. 146). From time to time, Drug Mart advertised cut prices on Parke, Davis products (R. 113). Parke, Davis advised Drug Mart that Parke, Davis would refuse to sell the stores if cut-price advertising of Parke, Davis products continued and Drug Mart in fact discontinued such advertising for a period of several months (R. 106, 112-13, 147-48). There is evidence that one reason for Drug Mart's discontinuing this advertising was that Parke, Davis advised the organization that it was treating as a discount item certain resale premiums which, under Parke, Davis' sales policies were required to be paid to sales personnel in the various stores, and the buyer for Drug Mart felt he was not interested in promoting Parke, Davis' goods if he could not treat these payments as a discount (R. 241-42). Parke, Davis did not solicit any agreement, and Drug Mart did not enter into any agreement or understanding of any kind with Parke, Davis concerning prices or advertising. The evidence shows that each member store of the organization was free to charge whatever prices it wished and to advertise as it wished, regardless of whether there was any joint advertis-

ing of Parke, Davis products (R. 106, 112-13, 148; Stipulation, R. 26).

23. Dart Drug was cut off early in July when it continued to sell at cut prices after being advised of the Parke, Davis policy (R. 61-62, 89). Sometime later in July, and again in the latter part of August, Parke, Davis' representatives advised Dart Drug that, if that concern advertised Parke, Davis products at cut prices, Parke, Davis would not sell to it, but that if it did not advertise such cut prices, Parke, Davis would sell to it (R. 82-83, 224-25, 232). Dart Drug ceased advertising Parke, Davis' products for a period of two weeks in July, and during this time purchased from Parke, Davis (R. 64-65). When it again advertised Parke, Davis refused to sell (R. 65). Parke, Davis again commenced selling to Dart Drug in August when Dart Drug ceased advertising and continued to do so after Dart resumed advertising two months thereafter (R. 74-76). At all times, Dart Drug sold Parke, Davis' products at cut prices in its store, whether or not it was advertising them (R. 83). Parke, Davis did not at any time solicit an agreement from, or make an agreement with, Dart Drug as to prices or advertising, but rather informed Dart of its policies and acted upon them (R. 60, 224-25, 230, 231-32, 257-59; G. Ex. 6, R. 98, 308).

24. State Drug and McReynolds Drug were among the retailers who were cut off by Parke, Davis when they continued to sell Parke, Davis products at cut prices after Parke, Davis' policy had been announced to them (R. 230). Neither concern individually advertised cut prices in the newspapers (R. 110, 119-20), though they did through Drug Mart, an association of independent retailers (R. 104-05, 121, 146). While neither one was alleged to have conspired individually with Parke, Davis as to pricing, advertising or any other matter, the Drug Mart group, of which State and McReynolds were members, was alleged to have conspired with Parke, Davis as to pricing and advertising (Plaintiff's Answer to Defendant's Interrogatory 2 (a), R. 12, 20).

25. No evidence was introduced to show that the discontinuance of advertising by a few retailers for a short period of time had any effect whatsoever on the prices charged to the public for Parke, Davis & Company products (*cf.* R. 83, 110, 120, 160).

26. On December 12, 1957, subsequent to the trial of

the companion criminal action, Parke, Davis informed Dart Drug Company that it was permanently closing the Dart account and did not intend to have any further dealings with that company (G. Ex. 5, R. 81, 307). Since that time, Parke, Davis has not sold its products to Dart Drug (R. 81). There is no evidence, however, that Parke, Davis made any effort to influence the dealings of Dart Drug with the wholesalers, and Dart Drug has continued to purchase Parke, Davis' products from wholesalers in the District of Columbia and to sell and advertise such products at cut prices (R. 82). Parke, Davis' action in ceasing relations with Dart was a purely unilateral one, and there is no evidence that it had any relation to Dart's prices or advertising policies.

27. In the fall of 1956, Parke, Davis in good faith abandoned and discontinued its efforts to maintain minimum resale prices in the District of Columbia and Virginia through refusals to sell (R. 173-75). Since the fall of 1956, and up until the present time, retailers in both areas, including retailers alleged to be co-conspirators, have continuously sold and advertised Parke, Davis products at cut prices, and have been able to obtain those products from both the wholesalers and or Parke, Davis itself (R. 82-83, 110-11, 122, 160-61). Parke, Davis has made no efforts to compel the cessation of these practices (R. 75-76, 110-11, 122). There is no proof or indication of any intention on the part of Parke, Davis to resume such efforts. There is no present threat or substantial probability or likelihood that Parke, Davis will attempt, in the District of Columbia or Virginia, to cut off retailers who fail to sell its products at its suggested minimum resale prices, or to cut off wholesalers because they in turn sell to such retailers. Nor is there any threat or substantial probability or likelihood that Parke, Davis will contract, combine or conspire with others to fix or maintain prices or terms or conditions of sale for its products in the District of Columbia and Virginia.

28. The Complaint also charges that Parke, Davis combined and conspired with five wholesalers to fix the prices at which the wholesalers could resell the products of Parke, Davis (Complaint, para. 14(a), R. 5). The evidence shows that the wholesalers were familiar with Parke, Davis' policies as stated in Parke, Davis' wholesaler catalogue and had for many years prior to June 1956 observed Parke,

Davis' suggested minimum resale prices because they each recognized that if they did not adhere to these prices Parke, Davis would not sell to them and they desired to continue as customers of Parke, Davis (R. 130-31, 139, 162, 184, 190, 196). There is no evidence that any of them made any agreement with Parke, Davis as to prices or that Parke, Davis ever solicited an agreement from any of them as to this matter.

29. The evidence shows that in early 1956 Washington Wholesale Drug Exchange, a cooperative, adjusted its practices in billing its customers on Parke, Davis goods so as not to credit any of its accounts with a cash discount on the face of the invoice, when Parke, Davis pointed out that it was crediting for a cash discount without proof that cash had in fact been paid (R. 268-69). Its billing practices were inconsistent with the suggested minimum resale price policy of Parke, Davis, which took no action to prevent the granting of cash discounts whenever they had in fact been earned (R. 270-71). Under the modified billing procedures, cash discounts were still granted in a different form (R. 269). The evidence shows that in making this change in its billing practices, Washington Wholesale was merely conforming to Parke, Davis' minimum resale price policy (R. 190), and did not make any agreement as to price (R. 190).

30. The Complaint also charges that Parke, Davis combined and conspired with five wholesalers to sell pharmaceutical products only to retailers licensed to fill or dispense prescriptions (Complaint, para. 14(f), R. 5). The evidence shows that the wholesalers were familiar with Parke, Davis' policy in this respect as stated in Parke, Davis' wholesaler catalogue and had for many years prior to June 1956 refused to sell Parke, Davis' products to non-drug outlets because they each separately recognized that if they did not adhere to this policy, Parke, Davis would not sell to them and they desired to continue as customers of Parke, Davis (R. 139-40, 162, 167-68, 184, 190, 196-97). There is no evidence that any of them made any agreement with Parke, Davis as to sales to non-drug outlets, or that Parke, Davis ever solicited an agreement from any of them as to this matter.

31. There is no evidence that at any time during the period covered by the Government's proof Parke, Davis ever conferred or discussed its sales policies with more

than one wholesaler or more than one retailer at a time, nor that it made the enforcement of its policies as to any one wholesaler or retailer dependent upon the action of any other wholesaler or retailer (R. 59-60, 72-73, 100-01, 109-10, 117-18, 119-20, 124-26, 137-38, 147, 151-52, 154-55, 163-64, 197-98, 206-07, 260-61).